B + 7
w.
chron (SOJ)

(15)

July 18 - Sept 4

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 534

KARL BUZYNSKI, PETITIONER,

vs.

LUCKENBACH STEAMSHIP CO., INC., AND THE TEXAS CONTRACTING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED SEPTEMBER 9, 1937

(32,986)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 534

KARL BUCYANSKI, PETITIONER,

vs.

LOEWENBACH STEAMSHIP CO., INC., AND THE TEXAS CONTRACTING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED SEPTEMBER 9, 1927

(32,986)

TRANSCRIPT OF RECORD

UNITED STATES
CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT

No. 4786

LUCKENBACH STEAMSHIP COMPANY, INC.,
ET AL.,
Appellants,

VOLUME

HARL BUZYNSKI,
Appellee.

Appeal from the District Court of the United States for the Southern District of Texas.

(ORIGINAL RECORD FILED APRIL 7, 1936.)

U. S. CIRCUIT COURT OF APPEALS
FILED
MAY [illegible] 1936
Cathy J. Bodd
[illegible]

INDEX

	Page
Praecipe for Transcript and Acknowledgment of Service of same	1
Caption	3
Amended Libel	4
Answer of Defendant, Luckenbach Steamship Co.	8
Amended Answer of Defendant, Texas Contracting Co.	11
Evidence in Open Court	15
Eivdence for Libelant:—	
Testimony of H. Henning	16
Roush Gruen	32
K. Buzynski	51
Roush Gruen, recalled	56
W. Berg	60
C. E. Watson	85
Notation as to Depositions	97
Evidence for Respondents:—	
Testimony of C. H. Withoff	98
T. J. Anderson	118
Capt. H. H. Pyle	146
Discussion as to Parties at Interest	154
Evidence for Libelant:—	
Testimony of Dr. Jess A. Flautt	158
Statement of the Court on Testimony of Dr. Singleton	204
Testimony of Dr. A. O. Singleton	205

INDEX—Continued.

	Page
Evidence in Open Court—(Continued):	
Evidence for Respondent:—	
Testimony of Dr. W. Huddleston	212
Evidence for Libelant:—	
Testimony of J. Schulke	216
Michael Dwyer	220
Evidence for Respondents:—	
Testimony of Arthur Grigg	225
Agreement of Counsel as to Depositions, etc.	228
Evidence for Respondents:—	
Deposition of M. Strosk	230
E. M. Jackson	262
E. M. McCarthy	279
Agreement of Counsel as to Deposition de bene esse of Edmond O. Smith	284
Deposition de bene esse of Edmond O. Smith	285
Exhibit I—Drawing	317
Agreement of Counsel as to Testimony of Fred Zickl	318
Memorandum Opinion	319
Decree	322
Petition for Appeal, Order allowing same and fixing Bond, and Waiver of Citation	325
Assignments of Error	326
Bond on Appeal	328
Order for Transmission of Exhibits in the Original	331
Clerk's Certificate	332

PRAECIPE FOR RECORD.

Filed March 17, 1926.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION.

K. BUZYNSKI,

versus A. D. No. 1266.

LUCKENBACH STEAMSHIP COMPANY, INC., TEXAS CONTRACTING COMPANY, AND WILLIAM PARR & COMPANY.

Praecipe for Record.

To the Clerk of said Court:

Your are hereby requested to prepare and certify a transcript of the record in the above entitled cause for the use of the United States Circuit Court of Appeals for the Fifth Circuit, by including therein the following:

1. Caption, showing the style of the Court, number and style of cause and names of parties.

2. The amended libel.

3. The answer of respondent Luckenbach Steamship Company, Inc., to amended libel.

4. The amended answer of respondent Texas Contracting Company to amended libel.

5. All testimony adduced at the trial consisting of:

(a) All oral testimony taken in open Court.

(b) All exhibits offered in evidence.

(c) The deposition of chief engineer, M. Strosk.

(d) The deposition of master, E. M. McCarthy.

(e) The deposition of Mr. E. M. Jackson.

(f) The deposition of Mr. Edward O. Smith.

(g) The stipulation agreed upon by proctors concerning the testimony of Mr. Fred Zickl.

2 6. Opinion filed by Court.

7. Decree.

8. Respondents' petition for an appeal.

9. Order of Court allowing appeal and fixing amount of and approving supersedeas bond.

10. Assignments of error.

11. Supersedeas Bond.

12. Clerk's Certificate.

LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for respondents, Luckenbach Steamship Company, Inc., Texas Contracting Company.

The undersigned hereby acknowledge receipt of a true and correct copy of the foregoing Praecipe for the record to be transmitted to the Circuit Court of Appeals for the Fifth Circuit and waive the issuance and service of notice, on this the 12 day of March, A. D. 1926.

W. E. PRICE,
D. B. MacINERNEY,
Proctors for Libelant.
By W. E. PRICE.

---

3 CAPTION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT GALVESTON.

KARL BUZYNSKI,

versus No. 1266, In Admiralty.

LUCKENBACH STEAMSHIP COMPANY, TEXAS CONTRACTING COMPANY, WM. PARR & COMPANY.

BE IT REMEMBERED, that in the above entitled and numbered cause lately pending in said Court, at Galveston, and in which a Final Decree was rendered at the Regular January Term thereof, 1926, to-wit: on February 15, 1926, Honorable J. C. Hutcheson, Jr., United States District Judge for the Southern District of Texas, presiding, the following proceedings were had and taken, in said Court, to-wit:

4 LIBELANT'S AMENDED LIBEL.

Filed Aug. 19, 1925.

In the United States District Court for the Southern District of Texas, Galveston, Division.

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

The amended libel of Karl Buzynski, a citizen of Galveston County, Texas, against the Luckenbach Steamship Company, a foreign corporation; owner of the American Steamship "Edgar F. Luckenbach"; and against Wm. Parr & Co., a co-partnership, and against the Texas Contracting Company, a corporation, existing under the laws of the State of Texas, in a cause of action, civil and maritime, alleges:

1. That at all of the times herein mentioned the Luckenbach Steamship Company, was a foreign corporation, organized and existing under and by virtue of the laws of a state other than the State of Texas, and that said corporation has no agent within the jurisdiction of this Court upon whom service of citation may be had; but that said corporation is the owner of the American Steamship "F. J. Luckenbach" which is now within the Southern District of Texas, Galveston Division.

2. That at all of the times herein mentioned, Wm. Parr & Co. was a co-partnership, and was composed of Thomas H. Phillips, and Ben Phillips, and said partnership is engaged in business in the City of Galveston, said business being in charge of Thos. H. Phillips, upon whom service of citation may be had.

3. That the Texas Contracting Company, is a domestic corporation and Thos. H. Phillips, a member of the co-partnership of Wm. Parr & Co. is its president, and has an office and place of business in Galveston, Texas, and service of citation may be had upon its said president, Thos. H. Phillips, and that in fact and in law, The Texas Contracting Company, and Wm. Parr & Co., are one and the same institution and concern.

4. That the Luckenbach Steamship Company is the owner of many steamships, which company operates in foreign and interstate commerce; and that Wm. Parr & Co., and or the Texas Contracting Company is a stevedore company, and is engaged in loading and unloading steamships in the Port of Galveston, Texas.

5. That on or about the 25th day of October, 1924, while the steamship "Edgar F. Luckenbach" was in the Port of Galveston, the libelant was employed by Wm. Parr & Co. and or the Texas Contracting Company, in the capacity of longshoreman, to work upon and load and discharge the cargo of the aforesaid steamship "Edgar F. Luckenbach," and while engaged in the performance of his employment, libelant was struck upon his back by a large, heavy double chain bridle, and was injured in his back, spine, kidney, bladder, liver and heart, and was paralyzed, and made sick, sore, lame and was disabled and crippled for life.

5. That by reason of said injuries libelant has lost large sums of money which he otherwise would have earned, has suffered, and will continue to suffer excruciating pain as long as he lives, has been and will be unable to walk, has been and will be confined to his

bed, has been and will be unable to move about except with assistance, and will require the services of physicians, surgeons, nurses and attendants, and will require medicines for all of which he will have to pay out large sums of money, and has been damaged in the sum of Forty Five Thousand ($45,000.00) Dollars.

6. That the aforesaid steamship Edgar F. Luckenbach, its gear, tackle, equipment, and appliances were under the exclusive management and control of the aforesaid respondents, and it was the duty of the said respondents to provide libelant with a safe place to work, and safe apparatus, gear, tackle and equipment to work with, and to keep the same in a reasonably safe condition, and it was the duty of the respondents to make inspections of the gear, tackle equipment and appliances to discover defects and dangerous conditions, and to warn the libelant of the same, and contrary to and in violation of its said duty, the respondents caused and permitted a large heavy double chain bridle to fall from the top of the cargo boom and strike libelant
6 on the back as aforesaid, and failed to provide libelant with a safe place to work, and to keep the working place safe, and failed to provide safe gear, tackle, equipment and apparatus for libelant to work with, and failed to warn libelant of the dangerous conditions of the working place, and of the dangerous conditions of the gear, equipment, apparatus and appliances, and the default failure of the respondents in the matters and things herein referred to was the proximate cause of libelant's injuries and damage.

All and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that said Luckenbach Steamship Company, and the said Wm. Parr & Co., and the said Wm. Parr & Co. and or the Texas Contracting Company be cited to appear and answer herein all and singular the matters aforesaid, and in case they or either of them cannot be found, then, that their property be attached to the amount sued for; and that this Honorable Court would be pleased to decree payment of the aforesaid sum of Forty Five Thousand ($45,000.00) Dollars, and that libelant have such other and further relief as in law and justice he may show himself entitled to receive.

W. E. PRICE &
D. B. MacINERNEY.

The State of Texas,
County of Galveston.

Karl Buzynski, being duly sworn says that he is the libelant named in the foregoing amended libel, that the same is true to the best of his knowledge information and belief.

his
KARL X BUZYNSKI.
mark

Sworn and subscribed to before me this the 12th day of August, 1925.

D. B. MacINERNEY,
(Seal) Notary Public, Galveston County, Texas.

7 ANSWER OF LUCKENBACH STEAMSHIP COMPANY TO AMENDED LIBEL.

Filed Oct. 6, 1925.

(Title Omitted.)

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

The answer of Luckenbach Steamship Company as the same is proceeded against in the amended libel of Karl Buzynski in the above entitled and numbered cause answers and alleges as follows:

I.

The respondent admits the matters alleged in paragraph one of the libel.

II.

The respondent neither admits nor denies the allegations contained in paragraph two but demands strict proof of the same.

III.

The respondent neither admits nor denies the matters alleged in paragraph three but demands strict proof of the same.

IV.

The respondent admits that it is the owner of many steamships as alleged and admits that The Texas Contracting Company does it's [its] stevedoring at the Port of Galveston, but denies that William Parr & Company is it's [its] stevedore and demands strict proof of the allegations in paragraph four not admitted.

V.

The respondent admits that on or about the 25th day of October A. D. 1924 that the libelant was employed by Texas Contracting Company in the capacity of longshoreman, to work upon the S/S "Edgar F. Luckenbach," but denies that he was employed by William Parr & Company. The respondent is informed and believes it to be true that the libelant was injured while working aboard the vessel by being struck by a chain, but has not sufficient information to form an opinion as to the exact manner in which the libelant was injured or as to the extent of his injury; and the respondent neither denies nor admits the allegations in paragraph five, relative to the manner in which the libelant was injured or to the extent of his injury but demands strict proof of such allegations.

VI.

The respondent has no knowledge or information as to any sums of money the libelant has lost as a result of the injuries complained of and has no information or knowledge of the pain he has suffered, and has no information or knowledge of the extent of his disability, if any, and has no information or knowledge of the medicines that will be required for his care or the cost of such medicine, and has no information or knowledge as to the extent of the libelant's damages, and consequently cannot form an opinion with reference to the matters alleged in paragraph five (6?), but denies the same and demands strict proof thereof.

VII.

The respondent denies that the gear, tackle, equipment and the appliances of the S/S "Edgar F. Luckenbach"

were under its exclusive management and control at the time of the libelant's injury and demands strict proof of such allegation. The respondent denies that it caused or permitted the large heavy double chain bridle to fall and strike the libelant as alleged and it denies that it failed to provide libelant with a safe place within which to work; and it denies that it failed to keep the working place safe, and it denies that it failed to provide safe gear, tackle, equipment, apparatus and appliance for libelant to work with; and it denies that it failed to warn libelant of the dangerous conditions of the
9 working place and of the dangerous conditions of the gear, equipment, apparatus and appliances; and it denies that it's [its] failure, as alleged in paragraph six (7?) was the proximate cause of the libelant's injuries and damage and demands strict proof of each and every allegation in this paragraph contained.

VIII.

The respondent denies that all and singular the premises are true but admits that the matter in suit is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

IX.

All and singular the premises are true.

Wherefore the respondent prays that the said libel be dismissed with costs.

LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for Respondent, Luckenbach Steamship Company.

State of Texas,
County of Galveston.

Thomas H. Phillips, being first duly sworn, deposes and says that he is one of the partners of the firm of William Parr & Company, and that this partnership is the representative of Luckenbach Steamship Company and that Luckenbach Steamship Company is a foreign corporation, and all of its officers, so far as the deponent knows, reside out of the State of Texas and the Southern District of Texas; and that he has read the foregoing answer and knows the same to be true and correct except as to that part alleged on information and belief and as to this he believes it to be correct.

THOMAS H. PHILLIPS.

Sworn and subscribed to before me this the 5th day of October, A. D. 1925.

MERLE S. WALKER,
(Seal) Notary Public in and for Galveston County, Texas.

---

10 AMENDED ANSWER OF TEXAS CONTRACTING COMPANY.

Filed Feby. 15, 1926.

(Title Omitted.)

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

The amended answer of Texas Contracting Company as the same is proceeded against in the amended libel of Karl Buzynski in the above entitled and numbered cause, answers and alleges as follows:

I.

The respondent has not sufficient information and belief to form an opinion with reference to the allegations contained in paragraph one, therefore demands strict proof of the same.

II.

The respondent believes that the matters contained in paragraph two are correct but demands strict proof of the same.

III.

The respondent admits that it is a domestic corporation and that Thomas H. Phillips is it's [its] president and that it has an office and place of business in Galveston, Texas, but it denies that the Texas Contracting Company and William Parr & Company are one and the same institution and concern and demands strict proof of such allegation.

IV.

The respondent states on information and belief that Luckenbach Steamship Company is the owner of many steamships and that they are operated as alleged
11 but it denies that William Parr & Company is a stevedoring Company and is engaged in loading and unloading steamships in the port of Galveston, and demands strict proof of such allegations. The respondent admits that it is a stevedoring company and is engaged in loading and unloading vessel [vessels] as alleged in paragraph four of libel.

V.

The respondent is of the opinion, same being based on information and belief, that on or about the 25th day of October, A. D. 1924, the libelant was engaged as a longshoreman on board the S S "Edgar F. Luckenbach" at Galveston, Texas, and that the libelant was employed by the respondent but it denies that the libelant was employed by William Parr & Company as alleged and demands strict proof of the allegation to this effect. The respondent is of the opinion, the same being based on information and belief, that the libelant was injured while working on board the S S "Edgar F. Luckenbach" on the date alleged but is not fully informed as to the manner in which the libelant was injured and demands strict proof of the allegations in this regard contained in paragraph four.

VI.

The respondent has not sufficient information or knowledge to know of the sums of money, if any, the libelant has lost as a result of his injury and does not know of the extent of pain suffered or to be suffered in the future by the libelant; and does not know of the extent of his disability; and does not know of the services of physicians that will be required in the future and does not know of the amount of medicine that will be necessary; and does not know of the amount of damages the libelant has suffered, but demands strict proof of each and every allegation contained in paragraph five of libel.

VII.

The respondent denies that the S S "Edgar F. Luckenbach", it's [its] gear, tackle, equipments and appliances were under it's [its] exclusive management and control;

and the respondent denies that it caused or per-
12 mitted a large, heavy chain bridle to fall and strike the libelant as alleged; and it denies that it failed to provide libelant with a safe place to work; and it denies that it failed to provide safe gear, tackle, equipment and apparatus for libelant to work with; and it denies all of the other allegations in this paragraph contained and demands strict proof of all matters alleged in paragraph six of libel.

VIII.

Shortly after the libelant's injury the respondent, Texas Contracting Company, caused to be paid and actually paid to said libelant the sum of $720.00, said payment being made from November 2nd, 1924 up to an [and] inclusive of July 5th, 1925, at the rate of $20.00 a week in conformity with the provisions of the workmen's compensation law of the State of Texas. These payments were made without admission of liability on part of Texas Contracting Company; and the respondent prays that the amount paid as aforesaid in the event judgment is rendered against this respondent, be taken in consideration by the Honorable Court and that said judgment be decreased according to payments made.

IX.

It denies that all and singular the premises of said libel are true, but admits that the matter in suit is within the admiralty and maritime jurisdiction of the United States of this Honorable Court.

X.

All and singular the premises are true.

Wherefore respondent prays that the said libel be dismissed with costs.

LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for Respondent, Texas
Contracting Company.

13 State of Texas,
County of Galveston.

Thomas H. Phillips, being first duly sworn, deposes and says that he is president of the Texas Contracting Company which corporation has an ofifce in Galveston, and that he has read the foregoing answer and knows the same to be true and correct, except as to that part as alleged on information and belief and as to this he believes it to be true.

THOMAS H. PHILLIPS.

Sworn and subscribed to before me on this the 15th day of February, A. D. 1926.

J. W. LOCKHART,
(Seal) Notary Public in and for Galveston County, Texas.

---

14 ORAL TESTIMONY TAKEN IN OPEN COURT.

Filed March 23, 1926.

In the United States District Court for the Southern District of Texas.

(Title Omitted.)

Be it remembered, that upon the trial of the above entitled and numbered cause on the 12th day of Janu-

ary, 1926, before Hon. J. C. Hutcheson, Jr., the following proceedings were had to-wit:

Appearances:
For Libelant, Hon. W. E. Price.
For Respondent, Wm. Parr & Co., Hon. Mart H. Royston.
For Respondents, Luckenbach S. S. Co., and Texas Contracting Company, Hon. J. Newton Rayzor.

Mr. Rayzor:
We would like to file an agreement that has been entered into as to some testimony with counsel, and we would also like to file with the Court a copy of a motion asking that the Libelant at a proper time be required to submit himself to an examination before a Commissioner appointed by the Court, and to a Doctor appointed by the Court, which we understand under the new Admiralty rules is the practice which the Court wants to adopt in those matters.

H. HENNING, called as a witness on behalf of Libelant, was sworn and testified as follows:

15 Direct Examination.

Questions by Mr. Price:
Q. State your name please.
A. H. Henning.
Q. Where were you employed on or about the 25th or 26th day of October, 1924, Mr. Henning?
A. At Pier 37.
Q. Were you employed on the Pier during all of the time?

A. Not all, just while they had the work going on.

Q. State whether or not you were employed on the Edgar F. Luckenbach about that time?

A. Yes, sir.

Q. What was your employment, in what capacity were you employed?

A. I was a gang foreman.

Q. Gang foreman. On board of the Edgar F. Luckenbach?

A. Yes, sir.

Q. What hatch were you employed at?

A. No. 3 hatch.

Q. Do you know whether or not Karl Buzynski, the Libelant in this case, was employed on that ship at that time?

A. Yes, sir, I hired him in the morning to go down in the ship's hold and do the work.

Q. Was that the morning he was injured or the morning before?

A. The very morning.

Q. You hired him to go down in the ship's hold?

A. Yes, sir.

Q. Now, state whether or not an accident occurred there at that time?

A. Something been gone on the winch—

Q. (Interrupting). Just answer yes or no, whether or not an accident happened. Did an accident happen?

16

A. An accident happened.

Q. Now, where was Carl Buzynski, the Libelant, at the time the accident happened?

A. On top of the hatches taking off the tarpaulins.

Q. He was on top of the hatch, what hatch was that?

A. No. 3 hatch.

Q. And you say he was taking off the tarpaulins. Then what happened to him?

A. A chain unhooked and fell and dropped right down on him.

Q. What chain was that?

A. That extending boom, amidship boom.

Q. Now, I wish you would describe the chain for the Court. State what kind of a chain it was.

A. It was a swivel chain with a bridle on it, one end was chained to each end of the fall, one end of the chain was fastened fast to the outrigger and the other end hooked on the single glock of the amidship hoist.

Q. Have you got any idea of the weight of that chain?

A. Probably runs from 40 to 50 pounds, the average chain hook, bridle double swivel chain weighed.

Q. Now, what was the cause of that chain falling down, Mr. Henning?

A. That winch been going around when nobody wasn't there and not known was clean up to the gin block.

(By the Court):

Q. The winch was what?

A. Been going around when nobody wasn't there; we nevers used no winches, we just taken off the tarpaulins and hatches, ready to go to work.

17 (By Mr. Price):

Q. You mean that the winch started off—

Mr. Rayzor:

Your Honor, we object to counsel leading him.

The Court:

I think certainly that is a very unfortunate way to do; I will sustain that objection. You are leading him clearly on your theory of the case.

Mr. Price:

I don't want to lead him; that is what he said.

The Court:

It's all right. The winch was going around with nobody there.

The Witness:

It must have been going around, I said, sir; we wasn't there.

Q. You didn't see the winch?

A. No, sir, the winches weren't used.

Q. You weren't using the winches at all at that time?

A. No, sir.

Q. You say, the winch must have been going around, but that's not what you say, it is just what you think?

A. Otherwise the fall wouldn't have been there; the fall was left the night before—

Q. (Interrupting.) Wait; you are talking too fast. Do you know when you left the thing the night before, do you know where the fall was?

A. Yes, sir.

Q. You saw it yourself?

A. I was right there, knocking off the gang.

Q. When you knocked off that gang, the night before, the fall was where?

A. Six foot above the hatches and high enough to clear everybody's head.

18 Q. High enough to clear everybody's head?

A. Yes, sir.

Q. And this morning, when the work was being done, there was nobody up in the winch stand operating the winch?

A. No, sir.

Q. You know that. Now then, was it the winch fall that hit him?

A. Yes, sir.

Q. And that fell down you say because the winch must have started with nobody there, that is what you mean to say?

A. Yes, sir.

Q. But you didn't see it and you don't know why it fell down. You just know that it fell?

A. Yes, sir.

Q. Did you see the winch revolving at all, did you see the drum turning?

A. No, sir.

Q. Did you see the fall hit him?

A. I seen it hit the man right next to him, four or five feet from him.

Q. Did the fall come down through the hatch?

A. It was hanging on another fall and it—

Q. (Interrupting.) Where was the man standing when it hit him, inside the hatch or outside.

A. On top of the hatch taking up the—

Q. (Interrupting.) He was on top of the hatch, and how close was he to the fall?

A. Just off his feet right on the side.

Q. No, I say, how close was he to the fall of
19 the winch?

A. It must have been about 25 or 30 feet up.

Q. I thought you said the fall was just six feet above the hatch?

A. Well, it was knocked off when the winch went up to the gin block, it went up to the end of the boom then.

Q. Did you see it go up to the gin block?

A. No, sir.

The Court:

I would like to find out just what actually happened and not what he thinks happened. Haven't you got a witness who knows something about the thing?

Mr. Price:

Your Honor, this man knows. He is explaining it in a seamanlike manner.

The Court:

But he's got no right to explain what he thinks occurred, because that is the province of an arguer and not of a witness. Now, he should be confined to testifying to exactly what he saw and should leave the inferences and the arguments to other people.

Mr. Price:

Well, I don't think there will be much dispute about this chain falling down and striking him.

The Court:

I say, I suppose somebody knows it. Go ahead with the examination. You just tell what you saw and not what you think happened or what somebody else told you.

Q. Now, Mr. Henning, state whether or not you saw a chain strike Buzynski?

A. I saw it when it hit him. I was right over it.

Q. Where did that chain come from if you know?

A. It couldn't come from nowheres's else, clean up to that amidship gin block at the end of the boom.

Q. It came from the gin block at the end of the boom, is that your answer?

A. Yes, sir.

Q. Where was that chain attached to, or what if anything was it attached to before it came down?

A. Hooked in the single block on the boom, the length of the chain.

Q. The length of the chain was hooked on the single block on the boom. Now, how did that chain get off the hook?

Mr. Rayzor:

We object to that, that is a pure conclusion of the witness.

The Court:

I sustain the objection.

Mr. Price:

We except to the ruling of the Court because the witness was present at the time of the happening of the accident. He has already stated that he saw the chain hooked onto the hook on the end of a block attached to the ship's boom, that he saw that chain fall and strike the Libelant in this case, that his testimony is so closely related to the happening of the accident that it is part of the res geatae of the case.

Q. Now, after the chain fell off and struck Buzinski, what happened then?

A. We took him on the shore.

(By the Court):

Q. Did what?

A. Took the sick man ashore, put him on the wharf and ring up the ambulance so he could be sent to the hospital.

(By Mr. Price):

Q. Now, was anything done with the chain or the block after that?

A. Lowered the boom down and hooked it on again.

Q. You lowered the boom down and hooked
21 it on again; you mean you hooked the chain on again?

A. On the same hook in the same block.

Q. What condition did you find that block in when you lowered it down?

A. This fall been going around and upset the block.

Q. Was the block in the same condition as it was the day before?

A. Yes, sir.

Q. Well, what happened then?

A. After we got it hooked on, we went back to work.

Q. Who fixed the hook on or hooked the chain on again?

A. The mate, the stevedore foreman.

Q. Who fixed it on before?

A. Also Mr. Kelly and the mate.

Q. Who is Mr. Kelly?

A. He is foreman for the stevedore.

Q. He is foreman for the stevedore?

A. Yes, sir.

Q. Who was the stevedore?

A. Mr. Parr carried the name, I don't know anybody else.

Mr. Royston:

We object to that, if Your Honor please, unless this witness knows.

The Court:

Overrule the objection, whether he knows or not is a matter of fact I will have to determine.

Q. Do you know who you were working for at that time, Mr. Henning?

A. Kelly is the foreman that hired me to go to work.

Q. Now, how many men were on deck at that time, how many longshoremen were around No. 3 hatch?

A. Eight men in the hold, and two winch-
22 men, and I, that would make eleven men.

Q. Eight men in what?

A. In the ships hold, excepting the crew, and two winchmen and I, that made eleven men all-told.

Q. At this very time where were all these men?

A. Taking off the tarpaulins, getting ready the hatches so we could go to work.

(By the Court):

Q. The winchmen too?

A. Yes, sir, they were giving a hand.

Q. The winchmen were taking off the hatch covers too?

A. Yes, sir.

(By Mr. Price):

Q. State whether or not there was anyone around the winch at that time?

A. No, sir, the winch was never used.

Mr. Rayzor:

We don't like to interpose an objection, but the answer of the witness is not responsive to the question; he asked him if there was anyone around the winch at that time and he says the winch was never used. We move the answer be stricken out.

The Court:

I think it is sufficiently answered.

Mr. Rayzor:

We think it should be limited to that particular time.

The Court:

That is the way he did mean it; of course, if you take it that the winches never were used, it is not responsive to the question, but I just thought he said the winches never were used. Is that what you were trying to prove?

Mr. Price:

Yes sir.

Q. Now, you had been working as gang
23 foreman the day before, had you not?

A. Yes, sir.

Q. Did you see the chain bridle on the end of that boom or that cargo fall move up?

A. That chain?

Q. Yes, did you see the chain move at any time from the time you went to work there; in the morning you stated that the chain was hanging high enough to clear a man's head?

A. Yes, sir.

Q. And you also testified that that necessary for the chain to move from where you had left it the night before up to the end of the block for it to fall down?

A. No, but the winch must have been going around or something brought it up there.

Mr. Rayzor:

We object to the answer.

The Court:

Objection sustained; I don't think he has ever testified that the chain—

Mr. Price:

(Interrupting) If the Court please, you can't expect this man to come in here and use the same facility in testifying—

The Court:

(Interrupting) I expect them to testify to the truth and nothing more.

Mr. Price:

Well, he is telling in his own way just what happened.

The Court:

He is telling in his own way what he and everybody else thinks has happened and not telling what happened. That is what he must be confined to, what happened; he can't testify that the chain fell off the block or rose from the block when he didn't see it; he is just guessing at what happened. At least, that is my ruling and what I am adhering to. He says he saw the chain strike him, but you didn't see the chain before it struck him, did you?

24

A. No, sir.

Q. You did see the chain when it struck him?

A. Only when it hit the man.

Q. You don't know where it started from or what started it, do you?

A. No, sir, but when you lower the boom down—

Q. (Interrupting) When you lowered the boom down after the accident, what did you find?

A. The block clean up to the gin block at the end of the boom.

Q. What you mean by that that, you say you found what up to the gin block?

A. The single block, what the chain was hooked on.

Q. You found the block that the chain was hooked on up where?

A. Up to the gin block at the end of the boom.

Q. How could that get up there?

A. That is what I don't know.

Q. How does it get up there ordinarily, if it travels up there, how does it go?

A. The only way it goes, the chain must take in the slack of the fall to get up there.

Q. Now, when that thing is operated—if the winch takes in the slack of the fall, that will bring the gin block on up to the top?

A. It will.

25 Q. Now, if the winch doesn't operate, the gin block don't go up, is there any way for it to go up without the winch operating?

A. No, sir.

Q. Now then, I think I understand what you say; you say that the day before when you quit work that this block, that the chain was attached to, wasn't up where you found it after the chain fell, is that right?

A. Yes, sir.

Q. But when you looked at the block after the chain fell, you found it up against the boom, you say?

A. Yes, sir.

Q. And you say while you didn't see it go up there—

A. No, sir.

Q. That the only way provided by that machinery for it to get up there was for the winch to have run, you say you know that from the way the winch operates?

A. Thats the way the winch runs.

The Court:

I think that is testimony not that thats the way it occurred but that's his testimony as to the circumstances surrounding the accident.

(By Mr. Price):

Q. Now, Mr. Henning, when the boom was lowered down, was that chain still in the hook?

A. No, sir.

The Court:

What do you mean by that, when the boom was lowered down when?

Mr. Price:

After the accident.

The Court:

Well, let's come to the point.

Q. Yes, sir. Then the chain fell out of the hook?—

The Court:

Was the chain in the hook the day before?

A. Yes, sir.

Q. And when the chain fell on him, it was not attached to anything, it was falling entirely loose?

A. Loose.

Q. Lying loose on top of the hold?

A. No, sir, on top of the hatches.

Q. Didn't go in the hold?

A. No, sir.

Q. It was lying loose and was not attached to the gin block at all?

A. Not to that fall.

Q. Attached to another end, somewhere?

A. The two booms, the two falls go together, take the two winches and the two falls to do that.

Q. The chain was left on two blocks?

(By the Court):

Q. The outrigger with the wire was fastened to one end of the chain?

A. Yes, sir.

Q. And the other end of the chain was fastened to the gin block?

A. With a hook.

Q. Hooked in the gin block and after this man was hit, you found that the end of the chain which had been in the gin block was out, and the gin block was up at the boom without any chain in it, is that right?

A. Yes, sir.

Q. But you didn't see when nor hear the winch moving did you?

27 A. No, sir.

(By Mr. Price):

Q. Did you say that you were present when that gear was rigged up the day before?

A. Yes sir, I gave them a hand.

Q. State whether or not there was anything placed on the hook to keep the chain from falling out?

A. There was a mousing put on.

Q. Now, what is the purpose of that mousing?

A. To protect, to keep them from falling out of there.

Q. To keep anything from falling out, what do you mean by that?

A. The chain, what was hooked on there.

Q. To keep the chain from falling out. Now, when you lowered the boom down after the accident, was that mousing on there that you had put on the day before?

A. No sir, I didn't see it.

Q. What is a mousing? How does it look?

A. Just a little wire with a line tied up fast, good and tight.

Q. It closes up the neck of the hook—

A. (Interrupting) Just a little protection on the neck of the hook and the end of the block where it crosses.

Q. Does it run clear across from the point of the hook to the shoulder where it drops down?

A. Yes sir.

Q. Closes that opening altogether, just like a little gate, if that little gate is maintained on there, nothing can get out, is that what you say?

A. Yes.

28 (By Mr. Price):

I show you a little sketch here and ask you if that illustrates the manner in which the gear was rigged up?

A. Yes sir.

Q. That shows one mast and one boom with the blocks in the position there were in on that one mast and the one boom?

A. Yes sir.

Q. It doesn't show the other outrigger that you spoke of, does it?

A. No sir.

Mr. Price:

We offer this in evidence as illustrating the question and answers previously propounded to the witness.

Q. Now, you say that mousing was not on the hook when you lowered the boom down?

A. I didn't see it, Mr. Price.

Q. Well, was there one there or not, Mr. Henning?

A. No sir.

Q. What was the purpose of that mousing—I believe you stated already the purpose of it.

The Court:

He stated pretty clearly the purpose of it was to keep the chain from jumping out.

Q. Now, you stated that this chain fell when there was no one at the winch?

A. No sir, no one at the winch.

Q. Now, how long have you been working as a longshoreman, Mr. Henning?

A. About 22 or 23 years, more or less.

Q. And during that time have you acquired a knowledge of the means of making the gear that you

29 use safe?

A. Yes, sir, I have seen quite a lot of it.

Q. In your opinion, could a mousing have been put on that hook that would have held that chain from falling down when the block tipped up?

A. No, not hold that amount of weight.

Q. Could you put any kind of a mousing on there that would have held the hook up when the block tipped up?

Mr. Rayzor:

We object, the witness has answered his question and this is merely trying to go over the same thing, and is placing it in a leading fashion. The witness has answered that no mousing could be put on there to hold the chain in that way; now counsel is going on, right back over it and asking it in a leading manner, and we object to it.

Mr. Price:

Just strike that last question out.

Q. What kind of weight do you mean, Mr. Henning?

A. You mean that chain weight?

Q. I am asking you what amount of weight you meant when you answered that other question.

A. That double swivel and the chain on it runs 40 to 50 pounds maybe more, that would be too much for any mousing.

The Court:

Well, what is the purpose of the mousing, if it wont hold the weight of the chain?

A. It is just a little protection.

Q. Just a little but not enough?

A. Not enough, sir.

(By Mr. Price):

Q. Do you mean that mousing that was put on or no mousing at all could have been put on to hold the chain?

A. No sir.

Q. What do you mean?

A. The weight would have been too heavy for that, even a wire wouldn't carry the weight.

Mr. Rayzor:

No question.

ROUSH GRUEN, called as a witness on behalf of Libellant, and having been duly sworn, testified as follows:

Direct Examination.

(By Mr. Price):

Q. State your name?

A. Roush Gruen.

Q. What is your employment, what do you work at?

A. Well, cotton screwman.

Q. How long have you been working at that?

A. At the business?

Q. Yes.

A. About 20 years, I guess, in this town.

Q. Where were you employed about the 25th or 26th of October, 1924?

A. On the Steamship Luckenbach on Pier 38—37—39—

Q. Pier 37?

A. Yes sir.

The Court:

You mean all of those piers or just one of them.

Mr. Price:

He just means one, Your Honor.

(By the Court):

Do you mean 39 and 37 or 37?

A. 37.

Q. You were just thinking out loud?

A. Yes sir; we move the ships you see from
31 one pier to another, to that pier.

(By Mr. Price):

Now, what were you employed as on that ship?

A. I was employed as a winchman.

Q. At what hatch?

A. No. 1 the first day, No. 2 winch the second day, then I moved to No. 3 and then back in No. 1. We moved all around you see. We work night and day on the ship for about five days, something like that, thats the time I made on the ship.

Q. Now, do you remember a man working there by the name of Karl Buzynski?

A. That must be the old gentleman.

Q. Do you remember a man being injured on one of those two days I mentioned?

A. Yes.

Q. Did you see the accident that occurred?

A. Well, I couldn't say that I seen it; I heard the old man hollo, hollo out, then I looked around, we were all taking off hatches you see, and tarpaulins and everything, and the first thing I know this chain come down and knocked him flat on the hatch and I looked around and see the old man laying there.

Q. When you first went to work that morning, where was that chain?

A. The chain was hooked, not what I think right, it was hooked in a hook, you see, instead of being two

schakcles, which I think it should have been, it was a hook. Well, this hook slips out of there, you see, and goes aloft and down comes the chain on the old man's back.

(By the Court):

Q. The hook slips out of what and goes aloft?

A. This hook, Your Honor, was hooked into a shackle, just with the mousing on it, you see, and this
32 hook slips out of this shackle and goes aloft and down comes the chain.

Q. Was the chain in the hook with the shackle on the hook, was the shackle on the hook so as to keep the chain from coming out, I mean, the mousing?

A. The mousing wasn't hardly good enough on, I don't think, this morning.

Q. There is too much thinking here and too much not doing. Don't tell so much what you think. Just tell what you saw and what happened. Leave out what you thought, because you ideas may not be very valuable.

(By Mr. Price):

Q. Now, Mr. Gruen, did you see the chain strike Buzynski?

A. No, sir.

Q. Did you see the chain before it unhooked, if it did unhook, that morning?

A. No, sir.

Q. Did you notice the chain the night before when you quit working?

A. Yes, sir, I noticed the chain, yes, hanging up.

Q. Where was it?

A. We hoisted it up say about 10 feet above the hatch and left it there.

Q. And you didn't see the chain any more than until you heard Buzynski holloing and you saw the

chain, you saw Buzynski on the hatch and the chain close by him?

Mr. Rayzor:

We wish counsel would quit leading the witness, that is purely a leading question.

The Court:

It don't make any difference, he is just asking him.

Mr. Rayzor:

33 I object to the form of asking the question.

The Court:

Overrule the objection because it is not a material matter; he don't prove anything except that he didn't see anything.

Q. When was the last time you saw the chain hanging aloft?

A. That night when we left at 5 o'clock.

Q. Is that the last time you saw it hanging aloft, Mr. Gruen?

A. Until next morning, of course I seen it then.

Q. You saw it next morning?

A. Yes.

Q. And it was still hanging aloft the next morning?

A. Yes, sir.

Q. Then the next time you saw that chain, where did you see it?

A. I seen it on the hatch, on top of that man's back.

Q. That is what I want to know. How did that chain get down on top of that man's back?

Mr. Rayzor:

We object to the question, calling for a conclusion of the witness.

The Court:

I will sustain the objection. Don't answer.

Q. How did the chain get down on that man's back if you know?

Mr. Rayzor:

Same objection.

The Court:

I sustain the objection.

Mr. Price:

I think if he knows how the chain got down on his back, certain he is entitled to state it.

The Court:

He don't know, he can't know; he said he didn't see it come down. He can state the circumstances, the fall of the rig, the way the chain is attached, the way the block is handled, the way the hook is fixed and from those facts a conclusion might be drawn, but he can't say in his opinion this thing fell down for this reason or that reason.

34

Q. Mr. Gruen, was there anybody up on the end of that boom working around there?

A. That same morning?

Q. Yes, was there anyone on the end of the boom?

A. When this happened?

Q. Yes, sir.

A. No, of course not.

Q. Were you present when that gear was rigged up?

A. Yes, sir.

Q. Who rigged that gear?

A. Well, the mate had all to do with that he was to do all the rigging, the mate of the ship.

Q. Was or was there not a mousing on the hook?

A. It was when we first went on, but what is the good of a little piece of mousing? That aint going to hold nothing.

Q. What kind of a mousing did they put on there?

A. Just a small little bit of rotten rope yarn, thats all. The mate done it himself or told some of the men to do it, his orders.

Q. Now, you were a winchman there, the winch operator?

A. Yes, sir.

Q. Was you operating the winch that morning up to the time this accident occurred?

A. Never worked the winch at all. I helped them to roll off hatches and tarpaulins, never was near my winch, I had an inshore winch. That is called a starboard winch, the way she was laying, an inshore winch; never was near it, because I know it, thats why I didn't touch it.

Q. Who was operating the other winch the night before?

A. Well, we had so many winchmen working there, so many winchmen working night and day. On that winch it happened, I think it was Evans; Evans his name was, I believe.

Q. You aren't sure about that, are you?

A. You mean my winch or the off-shore?

Q. One of those winches?

A. Well, Evans had the winch before Mr. Berg had the winch that next day.

Q. When did Mr. Berg have the winch?

A. Well, he took the winch, let's see that night and he worked until 12 o'clock, or something—he was the winchman at that time, that day.

Q. Who?

A. Mr. Berg.

Q. Now, how many days had you been operating that winch before the accident or the winches on the ship?

A. All around, winches, No. 1, No. 2, No. 3?

Q. Yes.

A. Oh, about five days, I guess.

Q. What kind of a lever did they have on the winches to operate it with?

A. A lever that you couldn't trust, if you didn't hold on to it and there was steam on the winch, why she was going to fall. You either had to hold on to it or something would go wrong. Yes. That is, on that last No. 3 hatch. And No. 2 wasn't much better.

36 (By the Court):

The one where it fell off, was that No.3?

A. Yes, Your Honor.

(By Mr. Price):

Q. Well, what would make it do that?

A. Well, there was no catch there to hold the lever, you see. You see, no catch there at all, nothing at all to hold it after the steam was on. So either you had to hold on to it or put something underneath the lever so as to hold her there, or else bang! she would come down, yes.

Q. Well, did you observe the lever do that? Did you ever see the lever do that?

A. On very few ships.

Q. I show you some photographs and ask you if you can recognize them?

A. In this—

(Interrupting)

Don't you ask me. You look at these photographs of these winches?

A. It is pretty hard to tell about that.

Q. Is the operating gear on the Luckenbach ship that this accident occurred on the same as the operating gear shown in these photographs?

A. Yes, about the same as that.

Q. State whether or not the morning this accident happened to Buzynski, you saw or heard the winch move, to which that fall was attached?

A. Yell, sir, it happened so quick that nobody I don't believe ever know how it happened. The steam got on to this winch you see, and up goes the fall and right on him. Now, I call it a leaky winch, but thats
the only thing I can see to blame. As soon as
37 she had a little steam, she went ahead.

Mr. Rayzor:

We object to the evidence and move it be stricken out because it shows on its face it is merely his conclusions as to how the thing happened he didn't see the winch start.

(By the Court):

Q. Did you see the winch start? Did you see the block fly up that had the chain in it?

A. No, sir.

Q. You didn't see nothing, you didn't hear nothing?

A. No, sir, I didn't see nothing before I heard the old man hollo.

The Court:

I sustain the objection; strike the answer out as a conclusion of the witness.

Q. State whether or not you saw the winch move that block and fall up at any other time when there was no one at the winch?

A. Oh yes, I saw the other winch, that same winch move the day before and Mr. Henning, foreman of the gang told me to go over there and stop that.

Mr. Rayzor:
Just a minute.
(Continuing):
A. I said, I can't.

Mr. Price:
Just a minute.

The Court:
Don't answer the question when there is an objection.
Q. You say you saw the winch move the day before?
A. Yes, sir, without anybody there.
Q. Without anybody attending to the winch?
A. Yes,—No, because there was a man there all that day, you know, the man was attending to it, so I couldn't say that the winch moved by itself.
Q. You mean after the accident?
A. After the accident, yes, sir.
Q. Did you complain to anyone about the
38 winch starting when no one was at the lever?
A. I complained to Mr. Henning. I said you can't trust it very well.
Q. Did anybody ever say—any gang foreman or any winchman say anything to you about the winch operating—

Mr. Rayzor:
Your Honor we object—

Q. While it was in operation or moving?

Mr. Rayzor:
We object again, as calling for pure hearsay.

The Court:
I sustain the objection. There isn't any question in this case about whether the knowledge was brought home to the master, is there?

Mr. Price:
May it please the court, the defense in this case is that there were no complaints made to anyone about the condition of the winches?

The Court:
I don't see how that would be a defense, but if that is a defense, of course it would be admissable to prove there were complaints made. How would that be a defense?

Mr. Price:
Well, it would not be a defense, but there are so many things—

The Court:
(Interrupting):
You mean, they are undertaking to show evidentially that the winch was in good condition because nobody ever complained about that. Of course, if they are undertaking to prove that as a defense, I will let you make that proof in rebuttal.

Mr. Rayzor:
We have no such pleading in this case. We plead that the things he has alleged are not true. Thats our defense.

The Court:

I sustain the objection.

Q. Did you see this winch or any of those winches about No. 3 hatch move when there was no one at the lever?

A. I did, yes, sir.

Q. When was that, Mr. Gruen?

A. I seen that the day before this accident happened, I seen the winch move without anybody there, yes, sir.

Mr. Rayzor:

We object to the question and answer unless it is confined to winch No. 3, the port winch at hatch No. 3.

The Court:

Is that the winch you are talking about now, the same winch where this chain fell off?

A. Yes, your Honor.

The Court:

He said that once already.

The Witness:

Yes.

Cross Examination.

Questions by Mr. Rayzor:

Q. Mr. Gruen, on the day before this accident happened, you were operating the starboard winch at Hatch No. 3, weren't you?

A. Yes, sir.

Q. You had been operating that winch all the time during that day, hadn't you?

A. Yes, sir.

Q. The day on which this accident occurred, you were still on that same winch, weren't you?

A. Yes, sir.

Q. Still operating that same winch?

A. Yes.

Q. Now, you came on deck that morning—I just want to get this clear—

Mr. Price:

I am going to object to counsel for defendant telling the witness what the witness did. He has a right to cross-examine the witness to his heart's content, but I am going to object to him standing here and telling the witness what he did.

The Court:

Overrule the objection; that is the purpose of cross-examination.

Mr. Price:

Exception.

Q. You came aboard that morning, I just want to get this clear, you came aboard that morning. As I understand you, you saw the chain hanging about 6 feet over the hatch?

A. Yes, sir.

Q. You saw that?

A. Well, 8 or 10 feet, I couldn't swear to it, about 10 feet.

Q. But you saw the chain hanging up there?

A. Yes.

Q. Now, the night before at the time you struck off, you were still operating the starboard winch at Hatch No. 3?

A. Yes, sir.

Q. Now, when you left the ship you also saw that chain hanging up there about 5, 6 or 8 feet above the hatch, didn't you?

A. Exactly, yes, sir.

Q. That is what you testified. Now, I understand you have testified that when the ship started discharging a day or two days before the accident, whenever it was, that you were there when the gear was rigged, is that correct?

A. Why, yes, sir. I was there.

Q. Well now, have you testified, have you or not, I just want to get it straight, have you testi-
41 fied that you were there and saw the first mate and Kelly rig the gear or not?

A. Well, like I said, I said the mate was the leader or the rigging.

Q. I didn't ask you that; I say were you there and saw them rig the gear?

A. Exactly.

Q. You saw them?

A. Yes.

Q. And you say the mate was the leader?

A. Well, he was the rigger boss for this work.

Q. Now, did the ship's crew rig that boom or did your men rig it?

A. We rigged it.

Q. The first officer gave you instructions how to rig it?

A. Gave us instructions how to do, we had nothing to say then.

Q. Had you seen Mr. Kelly there?

A. I seen Mr. Kelly there, yes, sir.

Q. Now, did he say anything to you about rigging that boom?

A. No, I can't say that he did, much.

Q. He didn't have any part in it, the mate did it?

A. That's the way it looked to me, the mate had the power of being the leader.

Q. Was the mousing put on hook then?

A. It was.

Q. Who told you to put the mousing on?

A. The mate, told Mr. Henning to put the mousing on; Mr. Henning put that on, an old rope.

Q. Did you see the mousing after it was
42 put on?

A. Yes.

Q. Just an ordinary little yarn mousing?

A. You know, just a strand out of a rope.

Q. Just a strand out of a rope?

A. A rope.

Q. Just wrapped that around the hook?

A. Yes.

Q. When did you change your mind about this case?

A. I don't quite understand you, what do you mean, sir?

Q. Do you remember talking, do you remember signing a statement in which you gave the facts as you knew them about how this thing happened?

A. Just a short statement of it, I did, yes.

Q. You signed the statement?

A. A short statement, yes.

Q. Do you remember a gentleman coming to see you by the name of Mr. Hughes?

A. I do, one morning, yes, sir; on the corner of 20th and Mechanic, I remember the morning.

Q. Isn't it a fact, Mr. Gruen, that you told Mr. Hughes that you didn't see that chain the night you left that ship?

A. I didn't see the chain?

The Court:

It is very material; I think the whole question seems to turn on where the chain was before it fell. Your theory is the chain was hanging in this position, a certain number of feet above the deck, and then jerked up to the block and then fell down; then if he says he never saw the chain there, that is contradictory of what he has already testified. Overrule the objection.

Q. Didn't you make this statement to Mr. Hughes, "I was acting as winchman the day before and have no recollection of seeing the chain when they left work the evening before," or words to that effect?

A. Yes, sir.

Q. You made that statement?

A. Something like that.

Q. You say these winches when you go off and leave the lever, that they drop down and start the winches to running, is that what you testify to?

A. I did so, yes.

Q. Mr. Gruen, how long have you been acting as a winchman?

A. Well, off and on, I would say for 20 years.

Q. And you mean to tell this Court that if a winchman walks away from his winch and leaves that lever on center that it will drop down and start that winch?

A. That's exactly what I got to say, yes, sir; on certain winches; not all of them that have got a
46 clutch in to hold the lever, will stay, but them that ain't are going to fall down if the steam is on.

Q. So you know then, from your experience with these winches on this ship, you are talking about the winches on this ship?

A. Yes, sir.

Q. So you know then from your experience with these winches if you go off and leave them with that steam turned on, that that winch is likely to drop down?

A. Certainly, sir.

Q. I just want to ask you something to see if I am clear on it. Isn't there a stop valve on that steam pipe that leads from the engine room into that winch?

A. Why sure, yes, sir.

Q. If that steam valve is closed by the winchman or by anybody else, it does not matter which way that lever works, does it?

A. No.

Q. The winch can't move, can it?

The Court:

It takes steam to move the winches is what he asked you, doesn't it?

A. That is not moved, no, unless the steam valve or steam is on.

Q. Unless that stop valve on the feed line is on, that winch can't move?

A. No.

Q. So, if the winchman would go off and leave the lever with that steam valve closed, it wouldn't matter?

A. But you see, sir, if there is a leak in there—

Q. (Interrupting): Just answer my ques-

47 tion.

Mr. Price:

I think he has a right to answer that question. You asked him if the valve was closed, it wouldn't matter; he said it would if there was a leak in it. I don't want counsel interrupting the witness while he is in the middle of his answer.

A. Yes, sir; about 5 or 6 minutes after 8 when I got to work.

Q. What was you doing when you were hurt?

A. We take the tarpaulins off from the hatches, and then me and my partner roll hatches inshore side, and the other two men outshore side, roll hatches out, and then I don't know, somebody, something hurt me from on top, just I hear big noise and then I don't remember nothing. I fall down on my face and I can breathe no more, and some brother longshoreman working in same gang grabbed me and tried to raise me, of course he can do nothing, one man, and I got my hip broke and just I hollow after they carry me outside on wharf. Then put me in truck and I remember a little bit and then I don't remember nothing, who hurt me.

Q. What was it you said hurt you?

A. Hook and chain, two chains rigged up for double gear, to try to some railroad wheels, four wheels together and put on ship. And that fell down on me, right on my back and put me flat down, that's all, and then I don't remember nothing; they carry me out to the wharf and put me in truck and then I got my leg like that on this side and hurt me like anything, and I take my hand and hold little bit, hold my leg, and then ambulance come and take me in hospital.

Q. Now, you say it was five or six minutes after you started to work?

A. After 8 o'clock, just started to work, take tarpaulins and me and the other fellow rolled the hatches off.

Q. And this was the first day that you worked on that ship?

A. The first day on that ship I started.

50 Q. In other words, you were working there about five or six minutes when you got hurt?

A. Yes, sir.

Q. Now, was you in good health all the time, did you work steady when you worked out before this?

A. I worked all the time, if anything got to be worked, and I worked and I be healthy and I be strongest man, I think so, on this front wharf, you believe me or not, and I be all the time work and I be healthy. For 27 years I got this leg hurt.

Q. You have been working on the wharf 27 years, is that what you mean?

A. Yes, on the wharf all the time, make my living on the wharf, on ships.

Q. Are you a married man?

A. Yes, sir.

Q. How long have you been married?

A. About 35 years ago.

Q. 35 years ago?

A. Yes, sir.

Q. Now, what have you been doing since you were injured, what have you been doing since that time?

A. What time?

Q. Since you were injured?

The Court:

Since you got hurt, what have you been doing?

A. I been hurt and I never do anything, I laid down in the bed, that's all I doing.

Q. What have you been doing since you were hurt, you have been in bed all the time since you were
51 hurt?

A. All the time in bed, I laid down, sit down a little bit; that's all I do cap. That's 14 months and a half.

Q. [A.] 14 months and a half, and I got hurt right now all over my back, my legs, I lost my back, I lost my

legs. I feel all right, right on my chest, I can talk all right, and anything like that. I move my hands all right; my legs and my back I lost.

Q. Who put you to work that day?

A. Harry Henning.

Q. What position did he have?

A. He is gangwayman, he is boss in the gang.

Q. He is boss in the gang?

A. Yes, sir, not in ship, not in all ships; he is gangwayman of 5 men, the other fellows, the other five men, that make work like that, you know.

Q. So that you had hardly started when you were struck with this chain?

A. Yes, sir.

Q. Did you see the chain before it struck you?

A. Man, if you look down, hanging like that and looking down and working, you see if somebody hurt you, you don't know who hurt you. It hurt me and I fell down, I don't know nothing, I am just like you.

Q. When you first went to work there in the morning, did you see the chain then?

A. Yes, sir, I see the chain.

Q. Where was it?

A. It has been hanging between one mast
52 and derrick and between the other, you see.

Q. How high was it?

A. Oh, it is high, I can tell you, about 5, 6 or 7 feet, I can't tell you exactly.

Q. Six or seven feet from where?

A. From hatch.

Q. From the hatch?

A. Yes.

Mr. Rayzor:

We have no questions.

Questions by the Court:

Q. You said you heard a big noise when it hit you, just before it hit you, what kind of a noise did it sound like?

A. It looked to me Cap, a noise like block and boom, you know, go through the fall. It must be that block rolling down, you know, that chain and that fall, that make noise, and then it hit me, I don't know nothing about it.

Q. But the noise that you heard, what did it sound like?

A. Uh?

Q. What did the noise that you heard sound like, what kind of a noise was it, what did it sound like? Something hit something?

A. No, run wheel so quick, that makes noise, and the fall through the block, that makes noise.

Q. It sounds like the noise of something running through the wheel?

A. Of course.

Q. Is that what it sounded like?

A. Uh?

Q. Tell me again what you said the noise sounded like?

A. I don't say sounded like nothing like that,
53 I say the fall run through the block.

Q. What did you say the noise sounded like? What kind of a noise was it? What did it sound like to be?

A. Say Cap, I want tell you please, go bring in that fall and that block by golly, you will find out, about 30 or 40 feet high, what kind of noise, bring block. I can't explain to you, the noise, and block, and that block is fall—that's all I say. I can not explain to you about that noise, what kind of noise. Bring in that wheel, block,

it is a big noise, so quick, and I hear noise like that, that block and fall and that chain and hook, it hurt me.

ROUSH GRUEN was recalled by Respondent, and having been previously sworn, testified as follows:

Cross Examination (Continued).

Questions by Mr. Royston:

Q. Mr. Gruen, I understood you to say that you went to work on that boat the first day that the work started?

A. Yes, sir.

Q. They started to work on the hatches the first day?

A. Yes, all the white men forward; I don't know about the colored men aft; I guess all the hatches were worked.

Q. All the hatches were worked?

A. Yes, sir.

Q. Now, who rigs the falls on these hatches?

A. It all depends on who is called. We can do it if we are called to do it, but in most cases the ships crew do it.

Q. The ships crew do it?

54 A. Yes.

Q. Well, you say you were working No. 1 hatch. How many gangs on that hatch?

A. We started at No. 2.

Q. No. 2?

A. No. 2, that's the hatch we started when the ship first commenced.

Q. How many crews on that hatch?

A. It takes about, them days, about 22 men I think was picked up, that is, for the wharf and the hatch all-told.

Q. Now then, did the crew rig No. 2 hatch or did your gang rig it?

A. I believe we rigged No. 2. But I was on the wharf then, I wasn't on the ship when she started to rig . I was called after to go and run the winch.

Q. You were on the wharf?

A. At first, when the ship first came in. I was told by the foreman to stay on the wharf.

Q. Then you didn't take part in any rigging of any of the hatches?

A. No, sir.

Q. And how far off were you from them?

A. Well, we were sitting in the shed, I guess until—it took an awfully long while to haul her in, there was no water.

Q. You were sitting in the shed?

A. The wharf gang.

Q. You weren't watching what was going on?

A. No.

Q. Well then, how do you know who did the rigging on the No. 3 hatch?

A. When this accident happened?

55 Q. No, I am talking about when they rigged the falls. You weren't at No. 3 hatch when they rigged the falls of the No. 3 hatch?

A. The first day; no, sir.

Q. They don't rig them every day, do they?

A. No, sir. This happened on account everything went to pieces, guys and everything carried away.

Q. Guys and everything carried away?

A. Yes, it is a wonder 7 or 8 wasn't killed stone dead, but luck should happen, there wasn't a soul got hurt; that was the day before this man got hurt; guys and everything carried away.

Q. From what hatch?

A. From the same hatch.

Q. Everything was fixed up then and they went to work again?

A. That's the time they done the rigging up again; we lowered everything down and the mate done the rigging up again.

Q. You worked on it all that day?

A. Yes.

Q. Did you work on it that night?

A. No, they put another gang on and the night gang worked on it that night, we went home.

Q. You were picked to run the No. 3 starboard winch?

A. No. 3 starboard winch. I was on the starboard side on all the hatches all the time.

Q. And you never did run the No. 3 port winch?

A. Never had nothing to do with that side whatever.

Q. How far off were you from that winch where you were operating your No. 3 starboard winch?

56 A. Oh, I should say, about 8 feet or 10, about 8 feet.

Q. You had all you could do to attend to your own?

A. Oh, yes, I could never reach way over there.

Questions by Mr. Price:

Q. Mr. Gruen, when you testified this morning about the rigging up, you wasn't referring to the first time the gear was rigged?

Mr. Rayzor:

Now, Your Honor, counsel is leading and putting the very words in the witness' mouth.

The Court:

Objection sustained.

A. No, sir—

The Court:
I sustained the objection; the answer will be stricken out.

Q. What rigging were you referring to when you testified this morning that the men rigged the gear or was present at the rigging of it?
A. At the same rigging when he got hurt, the same rigging, the day before he got hurt.

(By Mr. Price):
Q. The day before he got hurt?
A. Yes, sir.

(By Mr. Price):
Q. Well, what was the cause of them rigging the gear the day before he got hurt?

Mr. Rayzor:
Now, we object to the question; it has no bearing on this accident.

The Court:
Objection overruled.

A. We were taking in big heavy car wheels that weighed about 4 tons, I should judge, and the hoisting up, you see, the single gear would hardly raise it, so we got it aboard and just about over the hatch,
57 when this guy and everything carries away and down on the wharf goes everything. Well, we had to lower this boom down, or gaff, lower it down and rig it up again. Put a double swivel block up aloft and a single below on that which should have been there in the first place to hold all this heavy stuff, and they rigged it all over.

Q. Who was in charge of the rigging at that time, after that guy carried away?

A. The mate himself, yes, sir.

Q. Now, I believe you stated that the day before this accident you quit work at what time? I mean you, the time you quit working?

A. At the same hatch?

Q. Yes.

A. Well, I guess about 5:00, 5:30 probably.

Q. Somewhere around 5:00 o'clock?

A. We were working night and day on it; I couldn't exactly tell the hour and minute.

Q. All right. You worked there till 5:00 o'clock at night and then you left and went home, is that so or not?

A. Yes, sir, and then a new gang came on.

W. BERG was thereupon called as a witness for Libelant, and having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Price:

Q. I wish you would state your name, please?

A. My name is W. Berg.

Q. What is your occupation, Mr. Berg?

A. I was a longshoreman.

58 Q. About the 25th or 26th of October, 1924, where were you employed?

A. Employed at the Luckenbach ship, No. 3 hatch, I believe it was.

Q. What was the name of that Luckenbach ship?

A. I couldn't tell you the name of it.

Q. It was a Luckenbach ship?

A. Yes, sir, a Luckenbach.

Q. What time did you go to work?
A. We were supposed to leave the station at 8 o'clock.
Q. On the day of the accident?
A. Yes, sir.
Q. Where was you working the day before the accident?
A. I don't know where—I took that shift that night, you know.
Q. What night?
A. At 7 o'clock the night before.
Q. The night before the accident?
A. Yes, sir.
Q. You took the shift, took that place there?
A. Yes, sir.
Q. You mean then that you went to work?
A. The night before.
Q. The night before at 7 o'clock?
A. Yes, sir.
Q. P. M.?
A. P. M.
Q. How late did you work that night?
A. I believe it was 10 o'clock, something like that.

Q. What were you doing?
59 A. I was running the winch, hoist.
Q. Running the hoist?

A. Yes, sir.
Q. That is one of the winches?
A. Yes, sir, the off-shore winch it was.
Q. The off-shore winch?
A. Yes, sir.
Q. What would that be, the starboard or port winch?
A. I couldn't tell you; anyhow, I run the off-shore, the hoist anyway.
Q. Now, what did you do when you quit work for the night?

A. I just put the lever down and left, that's all.

Q. You just put the lever down?

A. Yes, sir.

Q. Down where?

A. It was supposed to be neutral; I don't know if it was or not.

Q. Did the winch stop or not?

A. It stopped, yes, sir.

Q. State whether or not it was stopped when you left there?

A. Yes, sir.

Q. Now, what time did you come back?

A. The next morning.

Q. About what time?

A. I think we went to work at 8 that morning. We aint supposed to leave the station till 8 o'clock.

Q. So you went back to the same job?

A. Same job, yes, sir.

Q. Now, did you see a man named Buzynski there?

60

A. Yes, sir.

Q. Where was he?

A. He was right on the hatches where we were standing.

Q. Where you were standing?

A. Standing right on the side where they were taking the hatches off. You see, they only took out one section of the hatches, you see. One section was all. They've got the stuff stowed in sections; it comes out Galveston, and different ports, and they were taking out one section of them, putting the canvas back and was taking the hatches off.

Q. Did you see anything happen to Buzynski there?

A. Yes, sir, I seen when he got hit was all.

Q. Saw him when he got hit?

A. Yes, sir.

Q. What did he get hit with?

A. With a chain.

Q. Where did that chain come from?

A. Come from the hoist there at the top.

Q. State whether or not that was the chain that was on the hoist?

A. Yes, sir, that was the chain, you see, the outrigger and the hoist is together. The chain that was into the fall of the hoist, you see, it come off of that. It still stood on the outrigger chain when she swung over, you see.

Q. This chain then was still attached?

A. To the outrigger.

Q. The outrigger?

A. When it hit him.

Q. When it hit Buzynski?

61 A. Yes, sir.

Q. Then it did not come loose from the outrigger?

A. No, sir, it come loose from the hoist.

Q. Do you know who rigged that gear up?

A. No, sir, I couldn't tell you that.

Q. You didn't see that done?

A. No, sir.

Q. Now, how close were you to that hoist at the time this accident happened?

A. How close I was from what? From the winch or from the man that was hurt?

Q. No, how close were you to the winch?

A. Well, it was about, I expect, about 15 or 20 feet, something like that.

Q. Had you or not been running that winch at any time during the morning?

A. No, sir; no, sir; I never touched it.

Q. Had any of the winches at all been running that morning?

A. Not as I know of; no, sir.

Q. State whether or not there was any provision for holding the throttle in neutral on the winch that you had been running the night before?

A. Well, you couldn't do it, Cap, you had to feel your way on it. There was no preventer or stopping of it. You had to feel your way altogether; there wasn't nothing to keep her in neutral, not at all; you had to feel your way on it all the time.

62 Q. Is it customary for winches to be provided with a place to hold the throttle in neutral or not?

A. Yes, sir, most of them has got that, most of them has got a little spring on it.

Q. You say most of them have a little spring on it?

A. A spring, you catch it and lift it up and then you put her back in neutral and there's a little hold there.

Q. I will ask you if that's the kind of a lever you mean as shown in this photograph I am showing you?

A. Yes, sir, that's the kind—no, that aint the one. I don't think it is. It is one that you do that with, but then it is a different kind, I think.

Q. Now, I am not asking you if this is the winch on there?

A. No, no, it is a friction winch but it aint like them there; you lift them up and put them down; it sticks up on top, it wasn't like that one there at all.

Q. Well, I am asking you if this is the customary—

A. (Interrupting) winch?

Q. (Continuing)—way of providing a lever to hold—

A. (Interrupting) That's the kind of little notches that's supposed to be in them, yes, but it was a different winch than that; it was a winch on top.

Q. It was a different winch than this one?

A. Yes.

The Court:
He says they were a different winch.

Mr. Royston:
We object.

Q. He says this is the way they usually are?
A. With winches in them.

63 The Court:
What I mean, is, if this picture is not a picture of the winch in question, what does it have to do with the case, what does it illustrate?

Mr. Price:
To show the provision that is usually made on a proper winch for holding it in neutral.

The Court:
You are undertaking to show that this was not a picture of the winch that you say was a proper winch and then undertaking to show that the one wasn't that way?

Mr. Price:
Yes, sir.

The Court:
Well, I suppose it would be admissible for comparison, negatively as well as positively.

Mr. Royston:
We object to that.

The Court:
Well, I will admit it for that purpose.

Mr. Price:

We offer these three photographs in evidence that the witness has said is the usual position for holding the throttle valve in neutral.

The Court:

Holding the throttle valve?

Mr. Price:

Holding the throttle, and of course the valve is attached to the throttle, it would hold both of them.

The Court:

What do you mean by a throttle valve?

The Witness:

He means the lever, you know, if you bring her up, you take that spring and bring her up, up or down.

(By the Court):

Q. You mean the valve at the lever?

A. At the lever; it is no valve, it is just a throttle there.

Q. What is the valve at the lever?

A. The valve is where the key is.

Q. That is further back?

A. For the steam.

Q. That is not at the lever. So it is not
64 correct to say that is a throttle valve, is it?

A. No. It is the lever, we call it.

Mr. Price:

We will straighten that matter up later.

(By Mr. Price):

Q. Now, was the winch that you run the night before provided with the same device to hold the lever or throttle in neutral as those pictures I have just shown?

A. They have no spring there to hold it in there. There was nothing to hold it. It was gone.

Q. Now, after the accident, did anyone come to you for a statement?

A. No, sir, not till it must have been a month or so afterwards.

Q. Who came to you a month or so afterwards?

A. Some insurance lawyer, I expect, he was some big fat fellow; I don't know his name.

Q. You gave him a statement, did you?

A. Yes, sir.

Q. Now, who were you employed by Mr. Berg?

A. By Harry Henning, he was the gangwayman.

Q. He was the gangwayman?

A. Yes, sir.

Q. You were employed by Harry Henning? He was the foreman, was he, or not?

A. Gangwayman is what he was. Not the foreman, the foreman is the one that picks up the gangwayman, but the gangwayman picks up the men.

Q. The gangwayman—

A. Picks up the men to work.

65 Q. Picks up the men to do the work?

A. Yes, sir.

Q. And who was the foreman on the ship, the foreman stevedore?

A. Mr. Wisrodt, I believe, Wisrodt or somebody, we call him Kelly.

Cross Examination.

Questions by Mr. Rayzor:

Q. You have been a longshoreman for a great many years, haven't you?

A. About six or seven years.

Q. During that time you have acted as a winchman quite awhile?

A. Yes, sir.

Q. It is kind of an honor to be a winchman, isn't it, among longshoremen, it takes a pretty good man to operate one?

A. Well, at that time you had to be in a year before you could run one.

Q. In other words, a winchman is more than just an ordinary longshoreman?

A. That's right.

Q. It is a promotion to go from a longshoreman up to a winchman?

A. A winchman, yes, sir.

Q. I want to be sure that I understand just about this winch. You come aboard in the morning when you come aboard a ship, you are assigned to a winch, aren't you?

A. Yes, sir.

Q. Now, when you leave there at night, you have got certain things about that winch you have to do, don't you?

A. No, sir.

Q. You just go off and leave it?

A. Leave it, that's all, you just put her and
66 she stops, that's all there is to it; there's no rules or anything else.

Q. In other words, all you have to do as a winchman when you leave is just to stop it?

A. That's all.

Q. Just put the lever on center and walk on off?

A. Yes, sir.

Q. That is what you did this night?

A. Yes, sir.

Q. The night before the accident?

A. Yes, sir.

Q. You knew all the time you say that that winch didn't have those little knobs on it to stop that lever?

A. It never had it, not at all.

Q. You just put that lever on center and walk away?

A. You can fill that gap, you know, and she stops.

Q. So knowing those little catches were gone, those little knobs you have described—

A. Yes, sir.

Q. (Interrupting). You just put that lever on center with the steam on?

A. On, yes, sir.

Q. And just walked off. There's a stop valve, isn't there, on the feed line that leads from the engine room into that winch?

A. That key, yes, sir.

Q. Sir?

A. To stop the steam, you mean?

Q. Yes, sir.

A. But we haven't got no rules on that at all.

67 Q. I didn't ask you about any rules. We will come to that a little bit later. That is a picture of a winch, isn't is?

A. That's the kind of winches they were.

Q. That's the kind they had on the ship?

A. Yes, sir. But then that valve wasn't there though, that he's got.

Q. Do you see the man in that picture?

A. Yes, sir.

Q. He's got his left hand on a lever, hasn't he?

A. Yes, sir.

Q. That is what you call the control lever or actuating lever on that wench, isn't it?

A. Yes, sir; he can lift it up and down.

Q. Do you see his right hand?

A. On the valve, yes.

Q. What's he got his hand on?

A. Got it on that valve.

Q. That's the valve you close to cut the steam out of that winch, is that correct?

A. Yes, sir.

Q. Now, when that valve is closed, no steam can get into that winch, can it?

A. No, unless it escapes.

Q. Assuming that it is a good valve, if it is closed, no steam can get into that winch?

A. It can escape through there.

Q. I say, assuming it is good.

A. Yes.

68 Mr. Price:

We admitted this this morning, that if the valve was a good valve and was closed, the steam couldn't come through the winch; we admitted that.

The Court:

Yes; I don't see any reason to keep on arguing that.

Mr. Rayzor:

I think it is very material to this case.

The Court:

If he has admitted it, it isn't any more material then if he testified to it, if a man admits a fact, it is just as well proved.

Mr. Rayzor:

Not for the purpose of cross-examination of this witness, I don't think it is.

The Court:

All right, if you think it helps you, go ahead.

Q. Now, on the night you left the winch, you are sure, are you—

A. (Interrupting). I couldn't promise you that at all.

Q. (Continuing.) Wait, let me finish my questions. The night you left the winch, you are sure you didn't do anything but just put that actuating lever on center and walk off and leave it?

A. That is what I thought I done, anyhow.

Q. Do you say that lever won't stay on center?

A. It will stay at times, but with a little tremble, it will jump by those.

Q. If there is vibration around the ship, you mean, the lever is likely to fall?

A. Yes, sir; fall or go up.

Q. You gave a statement to Mr. Hughes. Was that the gentleman's name?

A. That's the guy, yes, sir.

Q. Did you give him a correct statement of
69 this?

A. I gave him just what I am telling you, the same thing.

Q. How many times did he come to see you?

A. Come to see me twice.

Q. You gave him a statement on both occasions?

A. No, sir; just one time, he asked me a couple of more little questions, but that was all.

Q. You didn't talk to him a second time?

A. A couple of questions.

Q. Just two questions?

A. A couple, I don't know whether it was two, three or four.

Q. Isn't it a fact that you told Mr. Hughes, when you left him that night that you closed that steam valve?

A. I told him that I didn't know if I closed it or not.

Q. Didn't you tell him that you left everything in proper shape?

A. I told him that I left it standing the way it was, yes, sir.

Q. And that you closed the steam valves?

A. I told him I thought I did.

Q. And you still think you did?

A. Yes, sir.

Q. Your statement awhile ago then—

A. I didn't know.

Q. Your statement awhile ago that you just simply left the lever there and didn't do anything at all, is not correct?

A. I didn't know that at all, because when we get through, we are in a hurry to get off of there.

Q. Now, which do you mean?

A. I told him that I didn't know if I closed it or not.

Q. You told Judge Hughes, as I understand
70 it—

A. Yes, sir.

Q. —That as you remembered it, you closed that valve?

A. I thought I did, yes.

Q. And you closed also the lever on the winch?

A. You couldn't close it, I left it on center.

(By the Court)

Q. What do you say now?

A. I told the Judge that I didn't know for sure if I closed it or not, I didn't know that.

(By Mr. Rayzor):

Q. Awhile ago on your direct examination, you told Mr. Price you just put the lever on center and walked off and didn't do anything else?

A. Well, I didn't know if I closed it or not.

Q. When you are testifying now, all you can say is you don't know what you did, is that it?

A. Yes, sir.

Q. Is that it?

A. Yes, sir.

Mr. Price:

We didn't ask him about the valve.

The Court:

I know you didn't, but you left the impression; in fact he stated that he just put the lever on center and went off.

(By the Court):

Q. You don't say now whether you closed the valve or not?

A. No, sir, I couldn't say.

Q. Which is your best recollection, that you did or you didn't?

A. I couldn't tell you that; I don't remember.

(By Mr. Rayzor):

Q. Why did you tell Mr. Hughes that you thought you did?

71 A. Well, I thought that when he was there; I didn't know who Mr. Hughes was or anybody else.

(By the Court):

Q. It don't make any difference who it is, don't the truth stay the same thing no matter who asks you?

A. Yes, the same thing.

(By Mr. Rayzor):

Q. Then if you told him that at that time, when was that statement made?

A. About a year ago, pretty close to it.

Q. Was your recollection a little better on it then than it is now?

A. Not a bit.

Q. At that time you told him that you recollected that you had closed the thing?

A. I told him I thought I closed it.

The Court:

How does it read?

Mr. Rayzor:

I haven't got his signed statement.

Q. Didn't you also tell Mr. Hughes that if the steam was closed off at that valve that it was the duty of the winchman to turn it off?

Mr. Price:

Now, if it please the Court, we are not going to have the winchman decide whose duty it is to do these things.

The Court:

I will sustain the objection to the duty, but as to the practice, I see no objection.

Q. Didn't you tell Judge Hughes that when a winchman left the winch—

A. (Interrupting.) I told him he didn't have to do nothing if he didn't want to.

72 Q. If he didn't want to?

A. Yes, there's no rules as to that.

Q. Now, haven't you been instructed by the superintendents and the foremen down there never to leave that winch unless you close that steam valve?

A. No, sir.

Q. You never received any instructions like that at all?

A. No, sir.

Mr. Price:

We object to the question and answer, because it is immaterial to the rights of the plaintiff in this case as to whether the foreman or superintendent instructs his men to do it, if it is their duty to do it, it is their duty to do it and not to instruct someone else to do it.

The Court:

I haven't got the theory of the law of the case clearly stated by anybody yet, but I will overrule the objection.

Q. Answer the questiton. You say there wasn't any instructions given you?

A. No, sir.

(By the Court):

Q. What was the customary practice, did the winchman turn off the key or not?

A. No, sir, there is no practice about that at all.

Q. Why wouldn't they?

A. Because if they had their safety valves on there, there was no danger of anything in the world escaping.

Q. You knew they didn't have any on them?

A. I didn't pay that much attention to it.

Q. You paid enough attention that they had no valves, but not enough to make it safe, is that what you say?

A. Yes, sir.

73 (By Mr. Rayzor):

Q. Now, when a winchman comes on in the morning, you usually go up to your winch, don't you?

A. You don't have to go up there until you are ready to go up there.

Q. You usually go up to your winch in the morning when you come on board?

A. After they get the canvas and stuff off of your hatches.

Q. You usually go up to your winch; what is the first thing you do, turn off this drain?

A. Yes, sir.

Q. That lets the water out of the cylinder?

A. You don't have to leave no water out of them at all, because there is enough steam escaping out of there that you don't have to leave no water out of there.

Q. Steam escaping out of the winch when you went off and left it?

A. Yes, sir, and it was still escaping.

Q. But you usually, when you go aboard a ship in the morning and have been assigned to a winch, you usually go over there and open up the water cocks on that winch, don't you?

A. Yes, sir, that is, if you are working piece work; if you are working longshore, you aint in a hurry to get there.

Q. Then you go along on the feed line to open up the steam valve?

A. Well, the most of them are open anyhow.

Q. That is, they leave most of them open?

A. Yes, sir.

Q. That's the winches you work on?

A. Yes, sir; some of the winches is open.

Q. But if it is closed, you go around and

74 open the steam valve?

A. Yes, sir.

Q. When did you open the steam valve on the morning this accident happened?

A. It was opened, it wasn't in the morning at all because I never did go there at all, because I went to the hospital with that man when he was crippled.

Q. You didn't do the usual and customary thing on the morning this injury happened, did you?

A. No, sir; I was on the hatches when he got hurt.

Q. The valve was already open?

A. I never went over there to see about it, because I helped to get that man away from there.

Q. You didn't go back to the winch after the accident happened?

A. No, sir.

Q. Didn't pay any attention to it?

A. No, sir, because I had to get that man away from there; one man has got to go with him.

Q. Now, on the night before this accident happened, all you did was just to close down your winch and leave?

A. That is what I thought I did.

Q. The steam was still on the winch?

A. Yes, sir.

Q. In other words, you just pulled down your winch lever and walked off?

A. Above the man's head.

Q. You pulled the chain up there?

A. Pulled it up there.

Q. Then walked off and left. I understood you to say a moment ago that you worked from 7 until 10 that night?

75

A. Yes, sir.

Q. And of course, when 10 o'clock came, knocking off time, you were in a hurry to go and you didn't pay much attention to what you did?

A. No, sir.

Mr. Rayzor:

I want to offer this picture in evidence and ask the stenographer to mark it for the purposes of identification, (Exhibit A.)

The Court:

I would like to ask you a question, to get just exactly what you say you saw and heard of the accident.

(By the Court):

Q. Did you see the chain hit the man?

A. I saw the man lying there after the accident.

Q. But you didn't see the chain fall?

A. No. I heard it when it hit him, when he holloed "Oh".

Q. Did you hear any noise, rattling of the chain or rattling of the blocks and falls?

A. No, sir, you know everybody taking up hatches and stuff that way, there's a noise on the ship all the time.

Q. You didn't see it run up?

A. No.

Q. You didn't hear it run up?

A. No, sir.

Q. You didn't hear anything at all?

A. Not until it hit the man.

Q. What did you hear then?

A. The man hollo.

Q. I know you heard the man hollo, you
76 didn't hear the chain?

A. No, I didn't hear the chain.

Q. How close were you to the man?

A. About 10 or 15 feet from him.

Q. You say there was a good deal of noise on the deck?

A. Yes, sir, you know when they throw their hatches off, they make a noise. If he would have fell this way, why he would have went right down in the hold.

Q. The hatches were open?

A. Right down in the middle where they take them off.

Q. They were already open?

A. Yes, instead of falling this way he fell this way. If he had fell this way he would have went right down in the hold.

Q. The only thing you knew of the accident, the only thing you actually saw, you saw the man lying down and you heard him cry?

A. Yes, sir, it was done that quick.

Q. Does steam stay on the ship all right [night]?

A. No, they cut the steam off.

Q. The boilers?

A. Yes, sir.

Q. At this time in the morning had the steam gone on again?

A. I never noticed that; whenever they shoot the steam on, they shoot it on when you come aboard.

Q. The practice is to put it on when you all come aboard?

A. Yes, sir.

Q. How long had you been there?

A. Never did get there, we were just taking the hatches off.

77 Q. How long had that happened?

A. About five minutes. You see, we left the station at 3 o'clock and the station is about—well about half a block, maybe, from the ship. The ship comes right in there where we stand, the bow of it.

Q. What time did you say this occurred then?

A. About 5 or 10 minutes after we left the station.

Q. And that is about the time they ordinarily turn the steam on?

A. Just about the time you get there, they turn it on.

Q. Just about the time you get to work?

A. The steam is turned on.

Q. The steam goes on?

A. Yes.

Q. Now, when you left work in the evening, was the steam cut off?

A. They cut it off after you leave, when you get through, they cut the steam off.

Q. But when you quit, the steam was on the winch?

A. The steam was on.

Q. You said something about the winch leaking, you mean it leaked through the valve, after the valve was shut?

A. Yes, sir, it was a funny winch, you couldn't hardly turn it loose at times. That evening, that same winch escaped and left the second time, I had to call Mr. Kelly's attention to it, when it went up the second time that evening when I come back from the hospital.

Q. At that time the steam valve was open, wasn't it?

A. Yes, sir.

Q. The only thing you mean is when the winch levels on center, it went on up. What made it go up

78 then?

A. It just naturally went up again because I called the foreman and showed it to him.

Q. I say, what made it go up?

A. Just shaking made it go up.

Q. Was there any shaking on the ship this morning when the chain fell?

A. Well, you know everybody was working around there, taking hatches and everything off, you know.

Q. What crew did you have on there?

A. Every hatch had men on it. I believe there was five or six hatches on that ship. I believe there's 4 hatches forward and three or four aft on them Luckenbach ships.

(By Mr. Rayzor):

Q. Now, you admitted awhile ago that you told Judge Hughes one thing about your recollection of this valve being turned off and then you came in here and in answer to Mr. Price's question you told another thing, that is correct, isn't it?

A. I told you I didn't know if I shut it off or not.

Q. Now, you come in and tell still a different story about the steam, don't you?

A. That escapes out of them winches; I told you it did.

Q. You just told the Court that they didn't turn the steam on these winches?

A. Until you get aboard.

Q. Until you get aboard?

A. Yes, sir, that is what they do.

Q. And Judge Hughes—one of the questions he asked you when he came to see you before this case
79 was filed was what time they turned the steam on, wasn't it?

A. I don't recollect that.

Q. You don't remember that question at all?

A. No, sir.

Q. Isn't it a fact that you told him that they always turned that steam on at least 30 minutes before you came aboard?

A. Whenever you get aboard, she is ready to go, the steam is turned on.

Q. You mean, when you get aboard, the steam is already on?

A. It is ready for you to go to work because you get to work at 8 o'clock, and sometimes they don't get the steam at that time, sometimes they don't; on ships you have got to ask for steam.

Q. Now, which is correct, the statement you made to the Court that they turned the steam on after you come on board or the statement you made to Mr. Hughes that they always turn it on at least 30 minutes before you get on board?

A. Sometimes they do and sometimes they turn it on late, and sometimes they don't turn it on until you get aboard.

Q. You don't know when it was turned on on the morning of this accident, do you?

A. Well, I thought it was turned on when I got there.

Q. You say you saw this winch start the day after the accident when nobody was at the winch?

A. Yes, that same evening.

Q. And you called Kelly's attention to it?

A. Yes, sir, but she was going aloft then.

Q. How far aloft did it go?

80 A. Well, it was going, they holloed for somebody to shut the steam off.

Q. Somebody ran over there and stopped it?

A. No, sir; one of the winchman wouldn't go over there, he said he had one winch to take care of himself; I wasn't working over there then.

Q. That time it went all the way to the top and stopped?

A. No, somebody went over there and stopped it.

Q. Did you see them go over there?

A. No, I didn't, because I wasn't working over there then.

Q. How is it you can come in here and testify about seeing it start and can't testify about who stopped it?

A. Somebody stopped it aboard; I don't know who it was; one of the men.

Q. You said a moment ago that you didn't look, didn't see anybody stop it?

A. I know that somebody stopped it.

Q. Did you see anybody stop it?

A. I never noticed any more, I was fixing up some of the rigging for some other heavy work.

Q. All you saw, you saw the winch start and you turned around and didn't pay any more attention to it?

A. Well, I was doing some work on the wharf and I didn't pay any attention.

(By Mr. Price):

Q. You told Judge Hughes that that winch started up that same day, didn't you?

A. Yes, sir, that evening.

81 Q You told that to Judge Hughes too, didn't you?

A. Yes, sir, but he didn't put it down, I don't believe.

Q. Who was it holloed for somebody to stop that winch off?

A. Mr. Kelly.

Q. Mr. Kelly?

A. Yes, sir.

Q. Who did he hollo to?

A. He holloed to them other winchmen; he wouldn't do it; he said he's got a winch of his own.

Q. What was the name of the other winchman?

A. He is out there, I don't know his name.

Q. That's the reason you cannot tell who shut the steam off or who he holloed to, because you don't know the man's name, is it?

A. Yes, sir.

Mr. Rayzor:

We object to counsel putting leading questions in the witness' mouth.

The Court:

Objection will be overruled. He is just arguing with him as to turning the steam on the winches, on the steam line, in the morning. What do you mean by that, did you mean that they turned the steam on on this ship at 8 o'clock in the morning when you went there or that it is customary to turn it on when you get to work at 8 o'clock.

A. It is customary—they've got it turned on.

Q. So in your statement to Judge Hughes, you didn't mean that it actually was turned on at 8 o'clock, did you?

A. No.

Q. Or did you not?

A. No, sir.

82 Mr. Rayzor:

We want to interpose our objection again to all leading questions.

The Court:

I think he is arguing with him, but I will take due notice of it, and if he gets it out of him by cork-screwing, I won't pay any attention to it. I overrule the objection. I will just say that testimony brought out by a willing witness in that manner, doesn't have much value.

Mr. Price:

Mr. Rayzor is attempting to show that—

The Court:

(Interrupting). Go ahead, don't argue the matter with me. There is nothing for me to hear. You make your examination as you are advised and I will judge it as I am advised.

Q. So in that statement to Judge Hughes, you told him about the steam, did you, the steam leaking out of the winch?

A. Yes, sir.

Q. And you also told him about the winch starting up when there was no one near it. That's all.

Mr. Price:

We have some pictures of the Edgar F. Luckenbach here we want to introduce in evidence. I understand counsel for the Respondent has no objection to them. They show the other side of the winch. (Exhibits 5-A to 5.)

C. E. WATSON, called as a witness for libelant, was sworn and testified as follows:

Direct Examination.

Questions by Mr. Price:

Q. I will ask you to state your full name, please.

A. Charles Earl Watson.

83 Q. What is your business or profession, Mr. Watson?

A. Consulting Marine Engineer, Surveyor and Appraiser is the way I list it on my letterhead.

Q. What training, education and experience have you had with steam vessels and their machinery and equipment and appliances?

A. I started out as a boy at 13, went to sea and since that went to school at Boston Tech. and have been in charge of three of the large plants on the gulf, construction, maintenance and repairs. Since October 1922, I have been in practice for myself here in Galveston.

Q. Did you or not examine the steam winches aboard of the Edgar F. Luckenbach?

A. Yes, sir.

Q. Do you remember the date that you made that examination?

A. I refreshed my memory on that by referring to my notes; it was October 19th.

(By Mr. Rayzor):

Q. What year was that?

A. 1925.

(By Mr. Price):

Q. Just state the kind and type of winch and describe the operating mechanism.

A. The winches were typical twin-cylinder single drum control gear winches designed I should say for a pull on a single line of about 8,000 pounds and actuated by a reversing valve rather than a reversing link. The reversing valve was controlled by a control gear that had been made evidently to conform with the conditions created by the grouping of the winches. It was not the original gear to all appearances, at least, that came with the winches.

84 Q. State whether or not you found any safety device provided for the operating mechanism?

A. Well, there was no definite means of holding the operating valve in its neutral position closed. The valve gear was unbalanced and an effort had apparently been made, so far as my observations would carry me, to bal-

nce the valve gear by compensation with the use of a lead weight on the valve end of the lever.

Q. Did you or did you not find any means provided for holding the lever as it was then on the ship in a neutral position?

A. There had been some real thin dogs installed in the lever or quadrant guide, but they were so shallow, the slot in them was so shallow it would not hold the lever. There was nothing to force the lever into that groove between those dogs other than the operator when he was operating it. It looked to me more that those dogs had been put in there more for the guidance of the operator than for a safety device, so that he could tell when the lever was central. I don't think the thickness of those dogs were in excess of 3/16ths of an inch.

Q. Would it have been an easy matter to have provided a device to absolutely hold that lever in position?

A. Yes, sir.

Q. How could that have been done?

A. Why, they could have been provided with a hole through the lever and a hole through the guide and a pin hung on a chain, put through there when the winch was not in use, or they could have adopted the
85 use of a ratchet quadrant.

Q. I will ask you if this is what you mean by a ratchet quadrant?

A. Yes, sir. (Referring to Exhibit No. 3.)

Q. I will ask you to make a mark on this photograph of the operating mechanism and show the place where the pin could have been provided?

A. This lever at the present time is not in a neutral position; you see it is down there.

Q. Yes.

A. It is safe to assume then that the central position of that lever would have been about there, and a pin

inserted through the quadrant and through the lever at that point would have definitely held it in position with the valve closed. I have seen similar installations to that shown on the exhibit.

Q. Now, if that pin had been provided there, Mr. Watson, it would not have made any difference whether the stop valve, steam valve was open or closed, would it, with the lever in neutral and the pin through the lever and the quadrant or guide?

A. Unless the valve gear was sprung, that would hold the valve closed; sprung or damaged in some way.

Q. That's the valve gear at the lever—

A. Yes, sir, I refer to the operating mechanism as the valve gear; it was rather flimsy.

(By the Court):

Q. Let me get this clear in my mind; this is different from mechanism where you put—after you open the lever for the steam to come in—the whole control of the steam is with the lever, isn't it?

A. Yes, sir.

86 Q. If you open the lever wide, the steam just pours in?

A. Yes, sir.

Q. It is not a case of opening the power with your hand and then the steam just comes in?

A. This reversing valve is shaped like a spool. If you shove it from one direction, it permits the steam to enter through one opening, that drives the engine in one direction. If you shove it in another direction, that excludes the steam in the other direction and runs the engine in the other direction.

Q. What I mean, the steam is constant on the engine there, but it is just a matter of letting the steam come in—

A. Shutting this valve and letting it pass through the cylinders.

(By Mr. Price):

Q. I will ask you, Mr. Watson, if this is a drawing made by yourself?

A. Yes, sir.

Q. Illustrating your testimony along that line?

A. Yes, sir. It is just a sketch. It is not to scale.

Mr. Rayzor:

Are you going to offer that in evidence?

Mr. Price:

Yes, sir.

A. That is typical of the conditions that exist there. There's no two of them exactly alike.

Mr. Price:

We offer the sketch. (Exhibit No. 6.)

Q. Now, from your experience, in your line of business and profession, what would you say about this operating mechanism as to its safeness or unsafeness?

A. In my opinion it is very crude and unsafe.

Q. Very crude and unsafe?

A. Yes, sir.

87 Cross Examination.

Questions by Mr. Rayzor:

Q. Mr. Watson, you examined this winch in October, 1925, is that correct?

A. Yes, sir.

Q. Now, your drawing here is not quite complete. I will just ask you to take your drawing and on the back of it please draw the valves you have been talking about. Here is a piece of cardboard, just draw it on the back. You have testified about the valves. I would like to see you draw it on the back.

A. I will put it in a horizontal plane instead of vertical.

Q. Now, I will ask you to mark down under the actuating valve, that is what it is, isn't it?

A. Yes, sir, steam or control valve.

Q. All right, just put control valve under there, will you please?

(Witness did so.)

Q. Now, Mr. Watson, the picture you have drawn, the sketch you have drawn does not show any ports in that valve?

A. Well, you got over here before I got the ports on.

Q. I beg your pardon. I thought you had completed it.

A. I didn't see this valve open. I don't know whether it is an outside port or inside port.

(By the Court):

Q. You mean, the opening in the valve by which the steam gets into the cylinder to drive your winch?

A. Yes, sir.

Mr. Rayzor:

Gets from the cylinder into the valve and from the valve into the cylinder.

Q. Now, will you please mark on the drawing you have made, please initial the intake port, that
88 is the port where the steam comes into the valve?

A. Wait a minute, there were two intakes and two exhausts. This gives it to you in a general way. This is the steam from the boiler.

Q. Will you please just mark that—

A. (Interposing) Steam.

Q. By "intake port" or whatever you call it.

A. As I say, I don't know whether that is an inside port or outside port, but that is the principle that the valve works on. The valve shoved in one direction permits the steam to come from here and through this port, you see, and shoved the other direction, this port is lifted and permits the steam to go in here and out that port. By changing the direction of the steam, you change the relative direction of the winch.

Q. May I mark on your drawing here at the top port, "top port", that is correct, isn't it? And at the other end "bottom port"?

A. Well, that is the way it is on that particular winch because the valve chamber is vertical. Some of them are horizontal.

Q. I say, on this particular winch?

A. Yes.

Q. And bottom port?

A. Those two ports, however, are the factors that govern the direction in which the winch turns.

Q. In answer to the Court's question a moment ago, you testified, as I understood you to testify, that the steam came directly from the feed line onto this actuating valve?

A. Yes, that valve acts as a reverse valve and a throttle valve.

89 Q. Now, that is true, Mr. Watson, isn't it, only when the stop valve on the steam line is open?

A. Yes, during periods of operation.

The Court:

What I had in mind was this: An automobile, you put your car in gear, then you have got to put some gas on to make her run, but here when you get this thing in gear, she runs anyway. You have just got one motion. Just like running an electric car, you push your little lever up, when your steam gets in, it is like running an electric car. My idea was after you opened the lever, there was something else you had to touch to put that steam on. I realize that if the stop valve is on, there is no steam.

Q. Did I understand you correctly to say and testify here that in your opinion it is a dangerous winch?

A. Yes;—not a dangerous winch; I mean the operating gear is dangerous.

Q. What does the operating gear mean, what do you mean by that?

A. This device here.

Q. Just call out the name?

A. From this point on, the operating lever and the manner in which this gear—

Q. You call that the actuating lever, the operating lever?

A. You could call it that.

Q. Just what about that lever is dangerous, I just want to be specific about this thing?

A. This valve, Mr. Rayzor, is apparently, on those winches, steam balanced; I mean by that, that it actuates or moves mechanically very easily. This lever here is a whole lot longer on one end than it is on the other. The result is it is unbalanced. During the period that those winches were being operated, I stood there and watched them. A winch that wasn't turning when the operator didn't have his hand on the lever due to the operation of the other winch would

start off of its own accord, due to this unbalanced condition here.

Q. In other words, the weight on this side of the fulcrum—on the side of the fulcrum with the long lever has a tendency to fall down and open the valves?

A. Yes, sir.

Q. That is what you had reference to when you talk about it being dangerous?

A. Yes.

Q. And that alone?

A. Well, this could be made safe.

Q. Well, I didn't ask you that, is it dangerous in any particular?

A. No, only dangerous insofar as it is susceptible to vibration and starting from unknown causes.

Q. Starting, in other words, from vibration on an adjoining winch?

A. Yes, sir.

Q. Or somebody drop something heavily on the main deck, it is liable to cause the control lever to drop down?

A. Yes, sir.

Q. And if the steam is on, of course, that will cause the winch to start. That is your only objection to the winch?

A. It was the glaring exception to all the rest, all the rest of the winch was in exceptionally good shape.

Q. Mr. Watson, don't you know it is a fact
91 that a vast majority of the ships running in and out of this port are rigged very similar to that?

A. Very similar but not like that.

Q. Don't you further know that on a great many of them there is no provision made for the pin you are talking about?

A. Yes, but they are in much better balanced condition than that.

Q. So the balanced condition is all you are complaining about?

A. And lack of definite provision for keeping the valve closed.

Q. Have you ever been a master stevedore?

A. No, sir.

Q. So you haven't had any occasion to observe the actual operation of many winches, have you?

A. Yes, I have observed the operation of a good many winches.

Q. You have observed them in your capacity of surveyor?

A. Yes, I went to sea for 14 years, very nearly 14 years.

Questions by Mr. Price:

Q. Now, Mr. Watson, with reference to the length of the lever, the actuating lever being unbalanced, now with this lead ball on the other end, the weight of the ball, the weight of the actuating valve, and the stem and the weight of the lever from the fulcrum, out to the center of the actuating valve, weighed more than the weight of the actuating lever from the fulcrum point to the end of the lever, would or would it not be unbalanced the other way and have a tendency to rise—raise the lever instead of go down?

A. Yes, sir, I should judge so.

Questions by Mr. Rayzor:

Q. Did you examine the port winch at No. 3 hatch?

A. I looked at all of the winches, I didn't
92 pay particular attention to any of the winches.

Q. Was there a lead ball on the port lever at No. 3 hatch just off of the fulcrum towards the valve stem?

A. The port side? That vessel was lying bow in, wasn't she?

Q. Yes, bow in?

A. Yes, sir, I looked at that.

Q. Did you see a lead ball there?

A. Yes, sir, there was a lead ball; all of the lead balls had the appearance of having recently been put on.

Mr. Rayzor:

We object to that, that is wholly a conclusion of the witness.

The Court:

How could you tell whether a ball was a recent ball or an old ball?

A. The lead had the appearance of having been recently worked, that is having been recently cut and smoothed up and the bolts through the ball where they went through the lever were new.

(By the Court):

Q. When you say recent, what you mean is that they had new bolts and the lead on the ball looked like it had been recently cut, it didn't have the appearance of being worn?

A. No, sir.

Q. Or weather exposed?

A. No, sir.

Q. But you don't know whether they had been old balls?

A. No, sir, I couldn't say with any degree of certainty whether they had been there a month or six months.

Q. Did you examine the equilibrium of the balls with the handle of the lever?

93 A. Yes, sir, I moved some of them; they were very close to being balanced at that time

but they still operated so easily that they were still susceptible to vibration. As I said before, I watched a man there where there were two winches in operation, when one winch was shut down, the operator of that winch had to keep closing it all the time.

Q. Although it had the ball on it?

A. Although it had the ball on it to keep the winch from drifting.

Q. The lever?

A. He was always shoving it to keep the valve closed.

(By Mr. Rayzor):

Q. The tendency was to keep the lever from dropping down?

A. Not necessarily. I don't know which way he was moving it, but I know he was operating it to keep the winch from running.

Mr. Price:

I want to ask Judge Royston if he will admit that libelant was employed by the Texas Contracting Co. on this day and that he was the stevedore that was discharging the—the Texas Contracting Co. was the stevedore discharging the ship or loading it, whatever was being done, both loading and discharging.

Mr. Royston:

Well, I will state the facts. The facts will show this, that the Agents Wm. Parr & Co., the Steamship Agents, represented the Luckenbach Line, and that acting under the instructions of the Luckenbach Line, they had received bids for the stevedoring and those bids were forwarded to the Luckenbach S. S. Line in New York and the contract was awarded to the Texas Contracting Co., which is a corporation engaged in stevedoring work, and that the Texas contracting Co. was the stevedore—

94 The Court: (Interrupting):
You mean they employed this man at the time he was hurt; is that a sufficient admission?

Mr. Price:
Yes, sir.

The Court:
Will that cover what you want Mr. Price?

Mr. Price:
Yes, sir. I want to ask counsel for respondent whether or not he is going to introduce in evidence, the testimony of the witnesses that were taken by deposition. If he does not desire to do so, I would like at this time to introduce some of them in evidence.

Mr. Rayzor:
Why, Your Honor, I will introduce everyone of them. I have no reason to keep them out.

The Court:
He says he will introduce every one of them. If he don't, I will let you offer them.

Mr. Price:
All right, the Libelant will rest.

The Court:
Let me suggest that you offer these depositions in evidence, and I will read them going home.

Mr. Rayzor:
In that connection, we offer this stipulation.

(Depositions of Edmond O. Smith, M. Strosk, E. M. McCarthy and E. M. Jackson.)

C. H. WITHOFF, a witness for Respondents, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rayzor:

Q. State your name, please, to the stenographer?

A. C. H. Withoff.

Q. Are you actually known as Kelly?

A. Yes, sir.

Q. Around in your work?

95 A. Yes, sir.

Q. By whom are you employed?

A. Texas Contracting Co.

Q. How long have you been in their employ?

[A.] 17 or 18 years.

Q. Were you working for them on or about October 24th and 25th, 1924?

A. Yes, sir.

Q. Were you engaged about those dates in discharging the Steamship Edgar F. Luckenbach at Galveston?

A. Yes, sir.

Q. Do you recall a man having been injured on the Edgar F. Luckenbach about that time by a chain falling on him?

A. Yes, sir.

Q. Were you present at the hatch where this man was engaged in his work at the time the chain fell?

A. No, sir.

Q. Were you there after the chain fell?

A. Yes, sir.

Q. What were they doing, if anything, at the time you reached the hatch after the man was injured?

A. They were holding the man upon the hatch.

Q. Was the man sent to the hospital?

A. Yes, sir.

Q. Do you know whether a man by the name of Berg was on the ship at the time the injury happened?

A. Yes, sir.

Q. Do you know whether or not he went to
96 the hospital with Buzynski?

A. Yes, sir, he went to the hospital.

Q. Were you on the ship when Berg returned from the hospital?

A. Yes, sir.

Q. Did he talk to you after he came back?

A. Yes, sir.

Q. Did he call your attention to the port winch of Hatch No. 3 moving ahead at the time after he came back from the hospital?

A. Yes, sir.

Q. Did you see it move ahead?

A. Yes, sir.

Q. Explain to the Court how far the winch moved?

A. Just about a half a revolution, then she stopped.

Q. Did anybody stop the winch?

A. No, sir.

Q. What kind of tackle did you have on that winch at that time?

A. A gun tackle.

(By the Court):

Q. What did you say?

A. A gun tackle.

(By Mr. Rayzor):

Q. Does that move more rapidly or more slowly than the ordinary tackle?

A. More slowly.

Q. Did you say a half a round on the winch?

A. Just a half a revolution.

Q. How far would a half a revolution raise that gun tackle?

A. Well, I couldn't say.

Q. Could you estimate to the Court about how many inches or feet?

97 A. Well, it might raise it three to six inches.

Q. Have you been working the Edgar F. Luckenbach ever since she started coming in this port?

A. Yes, sir.

Q. When she first started coming in here, did she have the same winches on her she has got now?

A. Yes, sir; to my own knowledge, yes, sir.

Q. Have those winches always worked satisfactorily or not?

A. Yes, sir.

Q. Were you aboard the ship the day before Mr. Buzynski was injured?

A. Yes, sir.

Q. What position do you occupy with the Texas Contracting Co?

A. Foreman.

Q. In the discharge of your duties as foreman, are you carried about from one part of the ship to the other in the discharge of your duties?

A. Yes, sir.

Q. Did you see the port winch at Hatch No. 3 operating on the day of the injury?

A. Yes, sir.

Q. State to the Court whether or not it was operating satisfactorily?

A. It was working satisfactorily.

Q. After the injury occurred, did you continue to operate or have the port winch at Hatch No. 3 operated?

A. Yes, sir.

Q. Did it work satisfactorily or not?

98 A. Yes, sir.

Q. Did you operate it the following day, that is the rest of that day?

A. Yes, sir.

Q. Did it work satisfactorily.

A. Yes, sir.

Q. When that ship first came into port, on that trip, Mr. Withoff, do you know who rigged the gear on the port winch at Hatch No. 3?

A. It was rigged under the jurisdiction of me, I was there when it was rigged.

Mr. Price:

May it please the Court, we object at this time to the question and answer because the Libelant in this case was not employed on the ship at that time and anything done by any of these men employed on the ship would have no relevancy to the issue in the case since Buzynski did not work on the ship until the day he was injured.

The Court:

Objection will be overruled.

Q. Did or did not you direct the men as to how to rig the gear?

A. Yes, sir.

Q. Was there a mate of the ship present at the time you gave the direction?

A. Yes, sir.

Q. Whose men rigged the gear, your men or the crew of the ship?

A. My men.

Q. Did you examine the blocks on the gear and tackle connected with the port winch after the accident occurred to Mr. Buzynski?

A. Yes, sir.

99 Q. Just state to the Court, please, the condition you found the blocks in at that time?

A. Well, when we lowered the boom after the accident—

(By the Court):

Q. Wait a minute; describe to me first what you saw at the accident, before you did anything?

A. I saw the two blocks pull together at the end of the boom.

Q. Saw the block on which the chain had been hanging pulled up against the block from which it was suspended?

A. Yes, sir.

Q. The two blocks were right together?

A. The two blocks were right together; we lowered the boom.

Q. Wait; did you actually do the lowering, or did you get somebody to do it?

A. The men did the lowering; I gave orders to do it.

Q. Did you go to the winch and see anything about the lever or how it was working before?

A. No, sir.

Q. You don't know what the condition of that was, whether the lever was up or down?

A. No, sir.

Q. Just sent somebody there?

A. Yes, sir.

Q. Didn't examine the lever or cause it to be examined?

A. No, sir.

Q. Didn't examine the gas cock which was in the pipe, nor the lever to see whether or not it was opened or closed?

A. No, sir.

Q. Just sent somebody there to the winch
100 and told them to lower the boom?

A. Yes, sir.

(By Mr. Rayzor):

Q. Did you use the winch when you lowered the boom?

A. No, sir.

(By the Court):

Q. How did you lower the boom?

A. Lowered it by hand, sir.

Q. Lowered it by hand?

A. It is on a rig bit on the mast, right on the mast.

Q. That may confuse me or may enlighten me very much; you say that the block could have travelled up to where it was without the winch turning at all?

A. No, sir.

Q. If it took the winch to turn to get it up there, how could you get it down without the winch turning?

A. There's a tackle running from the end of the boom to hold the boom up onto the mast.

Q. You lowered the whole boom, you didn't just drop the block?

A. Yes, sir, dropped the whole boom.

Q. You didn't just work the winch and let the tackle come down to put the chain in it?

A. No, sir.

Q. But you lowered the whole boom down?

A. Yes, sir, lowered the whole boom down.

(By Mr. Rayzor):

Q. What did you find when you lowered the boom with reference to the condition of the block?

A. I found the block to be turned up.

Question by the Court:

101 The Court:

Found the block what?

A. The block had been jammed and turned with the hook up, the hook.

Q. Ordinarily hung down?

A. Yes, ordinarily it ought to have hung down but it was jammed so it just turned up.

Q. What do you mean by jammed?

A. The tackle or the winch going ahead, it pulled it so tight it jammed the block.

Q. In other words, the winch had gotten into motion in some way?

A. Yes, sir.

Q. And had jammed the block that held the chain into the other block so tight and so quickly?

A. Yes, sir.

Q. That it turned it upside down?

A. Yes, sir, turned it up and jammed it, yes, sir.

Q. Then that block which held the hook was not raised against the other block at the back end, but raised with the side of it against the block?

A. Yes, sir.

Q. It had not been turned clean over so that the hook was pushed into the block, was it?

A. No, sir.

Q. Just turned up on its side?

A. Just turned up on its side.

(By Mr. Rayzor):

Q. What was the position of the hook, was it in its proper place or upside down?

A. The point of the hook was down.

Q. Right the reverse from the way it ought to have been?

A. Yes, sir, the back was up and the point
102 of the hook was down.

Q. Did you examine the hook carefully?

A. Yes, sir.

Q. Was or was not there a mousing on the hook?

A. There was a mousing on the hook.

Q. Describe to the Court how the mousing was on the hook at the time you saw it?

A. When I lowered that boom down, I examined that mousing and it was pulled off the point of the hook.

(By the Court):

Q. It was not across the hook but it was on the shoulder of the hook?

A. It was on the shoulder, the middle of the shoulder or the point of the hook.

(By Mr. Rayzor):

Q. Was that the same mousing so far as you could tell from the appearance that you had put on the hook?

A. Sir?

Q. Was that the same mousing, so far as you could tell from appearance, that you instructed be put on the hook?

A. Yes, sir.

Q. What kind of mousing was it?

A. Rope yarn mousing.

Q. Is that the kind of mousing that you usually and customarily use in mousing a hook?

A. Yes, sir.

Q. If you lowered the lever on that part of the winch, pushed the lever down, and set the winch in operation, which way does that sling go; up or down?

A. Down.

103 Q. If you raise the lever does that make it go up?

A. Go up.

Q. Was that the way that winch was wound at the time this accident occurred?

A. Yes, sir.

Q. Have you ever seen those winches work any other way than that?

A. No, sir.

Q. Is it a custom in this port for winchmen when they leave their winch to close the stop valve on the steam line that leads to the winch?

Mr. Price:

We object, Your Honor, to the custom in this port or any other port, with reference to the winchmen closing the stop valve. The duty of the defendant in this case was to close that stop valve and to inspect it and see that it was closed and there is no duty on the winchman imposed on him by custom that could have any effect at all on the rights of the Libelant in this case.

The Court:

Objection will be overruled.

(The question was thereupon read by the reporter.)

A. Yes, sir.

Q. Have you or have you not given instructions to your winchmen to close those valves?

A. Yes, sir.

Mr. Price:

And we make the further objection, Your Honor, that Buzynski was not employed on the ship the day before and had nothing to do with the men employed there and any action of theirs at that time has no con-
104 nection with his rights at all.

The Court:

Objection will be overruled.

Mr. Rayzor:

That's all.

Questions by the Court:

Q. I would like to ask you, Mr. Withoff, after you dropped the boom and found the condition, you went to the winches to see what the condition was over there?

A. No, sir, I did not.

Q. Why didn't you find out what had caused this thing to run up?

A. The winches—they told me the winches were shut down so I didn't go further.

Q. Who told you?

A. The gangwayman, Mr. Harry.

Q. Told you the winches were shut off?

A. Yes, sir.

Q. What do you mean by shut off?

A. The steam was shut off.

Q. Told you the steam was shut off?

A. Yes, sir.

Q. That wouldn't prevent you going looking through the winch?

A. No, sir.

Q. What you mean by saying that they told you it was shut off and you didn't go over there, that did not prevent you from going over there?

A. No, sir.

Q. Why didn't you go and examine the winch and see what the condition was and see what caused it?

A. Because I wouldn't know what it is.

105 Q. Did you report the matter to the officers of the ship and ask them to see what the trouble was?

A. Yes, sir.

Q. You told them that the winch had run up in some way and caused this block—you say you have no experience with winches?

A. Yes, sir, I know how to run them, but I don't know about the valves.

Q. You didn't have anybody look to see whether the valves were open or shut?

A. No, sir.

Q. You made no investigation of the winch whatever, but just found a condition which you knew was a wrong condition but didn't try to find out?

A. The valve was closed.

Q. Wait a minute, you said you didn't go over there to see.

Mr. Rayzor:

We would like to ask the witness a question.

The Court:

Well, I would like to ask him a question, counsel.

Q. You didn't go over there yourself to see whether the valve was closed?

A. No, sir.

Q. Somebody told you it was closed?

A. Yes, sir.

Q. Who was it?

A. You could see it was closed. You could see it from the side of it.

Q. See it from the side of it?

A. Yes.

106 Q. How can you tell whether it was open or closed?

A. Because it was all the way down, sir.

Q. What was?

A. The valve was all the way shut, it was pretty well shut.

Q. You just looked at it from where you were and thought that it was all right?

A. Yes, sir.

Q. From your experience with the operation of that winch, you told counsel how it went when the lever dropped, the load dropped, when the lever rose, the load rose, the blocks went up. From that condition that you

saw there, from your experience with winches, was there any way for that block to have gotten up, the chain block to have gotten up to the main boom block except by—

Mr. Rayzor:

We object to that question because that is a question calling for a conclusion of this witness, hypothetical, purely surmise and conjectural.

The Court:

That's the character of question which the Court has a right to obtain information on, from those who know. I don't know anything about how those operate and the jury don't know, but I have a right to get the opinion of persons who are qualified.

Mr. Rayzor:

We are not attempting to qualify him.

The Court:

Well, I will attempt to qualify him.

Mr. Rayzor:

We except to the question and to the general character of questions which have been asked this witness, not proper questions to be addressed to him and he has not been qualified as an expert.

107 Q. You are the foreman in charge of that stevedoring gang?

A. Yes, sir.

Q. The winchman as well as the others?

A. Yes, sir.

Q. You are in charge of everybody working on that dock?

A. Everybody working on that dock.

Q. And yet you don't know about working or how to run them?

A. I don't know how to run them to know about the machinery.

Q. But you do know the way the lever operates to run it up or down?

A. Yes, sir.

Q. From that experience, I will ask you from your experience and your knowledge of their operation, your experience and knowledge of travelling blocks and their movement, what in your opinion was the cause of the block travelling up to the boom?

A. In my opinion, somebody pulled the lever up.

Q. I don't mean somebody, but I mean was it power from the winch that brought it up?

A. No, sir, it must be power from the winch.

Q. No other way for it to get up?

A. No, sir.

Q. There is no other way in your knowledge?

A. No, sir.

Q. For that block to have gotten up to where it was unless some steam simply went right in the port in the winch and pulled the thing up?

A. Yes, sir.

Q. That is correct?

A. Yes, sir.

108 Q. How it happened to come on you don't know?

A. I don't know.

Q. But you do know and there is no escape from it, that the only possible way for that thing to have occurred was for some steam to have come through a port in the valve and into some port of the winch and pulled that thing up?

A. Yes, sir.

Q. And you didn't go over to the winch to find out whether the lever was up or down?

A. The lever was right in the center.

Q. Awhile ago you said you didn't know where it was?

A. The lever was right in the center, you could see that.

Q. I thought you said awhile ago in answer to counsel's questions or to mine, that you didn't go over to the winch at all to examine it?

A. You could see it from the hatch.

Q. How far were you from the winch?

A. Well, I was as close as to the winch as from here to you.

Q. Was the hatch where the chain fell as close as from here to me?

A. It was closer than that.

Q. The winch was right at the hatch?

A. Yes, sir, it was right close to the hatch.

Q. Is that so?

A. Yes, sir.

Q. You mean where the man stood to operate the winch was right at the hatch?

A. No, sir, it was on the other end of the hatch where the man stood up and I saw him.

109 Q. I mean the man that was operating the winch?

A. Right down alongside of the hatch, he was right on the coaming?

Q. From where you were standing, you could see that lever at that time was on center?

A. Yes, sir.

Q. Well now, do you know, from the operation of the winch, if the block, the travelling block, started up—that block that had the chain, what do you call that block that had the chain on it, travelling block?

A. Yes, sir.

Q. If that started up and jammed with the force that must have been on it to make it jam like you saw it, what would stop the winch, would that block stop the winch?

A. Yes, sir.
Q. The boom could stop the winch?
A. Yes, sir.
Q. Without tearing the boom out?
A. Yes, sir.
Q. Could it do that if the whole force of the steam from the boilers was on the winch?
A. Well, I couldn't say, sir.
Q. You don't know anything about that?
A. I don't know sir.

Questions by Mr. Rayzor:
Q. Mr. Withoof, while you had the boom lowered down, did the winch start in operation by itself? Did the winch move while you were lowering the
110 boom?
A. No, sir.

The Court:
No, he said the steam was off; didn't you?
A. Yes, sir.
Q. The steam was cut off; who caused the steam to be cut off?
A. I don't know, sir.
Q. You don't know when it was cut off or how it happened to be cut off?
A. No, sir.

Cross Examination.

Questions by Mr. Price:
Q. Mr. Withoff, you say you have been working for the Texas Contracting Co., how long?
A. 17 or 18 years.
Q. 17 or 18 years?
A. Yes.

Q. Was that as foreman?

A. As foreman, yes, sir.

Q. And you have general supervision of the longshoreman and stevedores loading or discharging the ship?

A. Yes, sir.

Q. Now, with reference to the mousing, can you recall now what kind of a mousing was first put on that hook?

A. Yes, sir, it was a rope yarn mousing?

Q. What is the purpose of that mousing?

A. For keeping anything that is in that hook from slipping out.

Q. Could this rope yarn that you put on there have kept that hook from slipping out?

111 A. Yes, sir.

Q. Well, why didn't it keep it from slipping out then?

A. Well, because the weight of it pulled it off of the end of the hook when it went up there.

Q. You didn't see it do that?

A. I didn't see it do that, no, sir.

Q. You saw, after the block was lowered down, you saw that the mousing was pulled off the hook?

A. Yes, sir.

Q. Now, isn't it a fact that the mate put a wire mousing on there when the boom was first rigged up?

A. No, sir.

Q. You say there wasn't a wire mousing put on there?

A. No, sir, not when it was first rigged up, no, sir.

Q. Was there ever a wire mousing put on it?

A. Yes, sir.

Q. When was the wire mousing put on it?

A. After the accident.

Q. Was that wire mousing capable of holding the chain in the block if it did tip up?

A. The same as the other one.

Q. They turn the steam on without saying anything to the stevedore about when they are going to turn it on?

A. The steam is on when we go to work.

Q. Well now, it would be dangerous practice, wouldn't it, to turn the steam on without somebody going around and shutting off these valves and seeing that the lever of the winch is in proper position on central?

A. I don't know anything about that.

Q. Well, you have had 14 years experience as foreman in this work, would it or not be dangerous practice to do that, Mr. Kelly?

A. Well, I don't think so.

Q. You don't think so?

A. It is always the way they do it.

Q. But you say it is customary for the mate to go around, or someone connected with the ship?

A. Yes, sir.

Q. To shut this valve off?

A. Yes, sir.

Q. And see that the levers are on center. Now, how big of a crew was there on that ship?

A. I don't know, sir.

Q. Rather a large ship, wasn't it?

A. Yes, sir, quite a large ship.

Q. Carried a pretty large crew, didn't it?

A. I don't know what kind of crew it carried.

Q. Those men leave the ship in the evening and go ahore, don't they?

115 A. I couldn't say.

Q. Well, as the result of all the experience you have had, can you or can you not say that they went ashore or came back again?

A. Not all of them, no. There's people aboard the ship all the time.

Q. I don't mean that all of them went ashore; some of them go ashore and go back and to their quarters?

A. Yes, some of them do.

Q. And those that are on watch go to the store rooms and to various places about the ship in connection with their duties?

A. Yes, sir.

Q. How much did that chain weigh, Mr. Kelly?

A. I don't know sir.

Q. Have you got any idea?

A. No, sir, I haven't.

Q. You couldn't estimate the weight of the chain?

A. No, sir.

Q. How long was it?

A. Well, it was a double hook, it was about that long (indicating about 2½ feet) with two swivel hooks on the side and one on the bottom.

Q. Now, you were using that to hoist these trucks aboard?

A. Yes, sir.

Q. Railroad freight car trucks or passenger car trucks, something like that. Now, was that chain—you say there were three pieces of it about this long?

A. No, it was all in one piece.

116 Q. Yes.

A. It is a regular double fall hook.

Q. Was that chain of the size that you mentioned, was that long enough to make a turn around the truck?

A. No, sir, no, sir.

Q. What I wanted to get at is the size of the chain if you could tell me.

A. The size of the chain was about 2½ feet long.

Q. You don't know the weight of it?

A. No, I don't know that.

Questions by the Court:

Q. When you came on board that morning, did you examine to see if the steam was on?

A. I didn't examine the valves, no, sir.

Q. You know whether the steam was on or not?

A. The way it looked to me, that it wasn't on.

Q. When you first came on?

A. When I first came on after the accident.

Q. You didn't come on till after the accident?

A. No, sir, I was in the aft end of the ship, standing there, when that accident happened.

Q. But you had come on the ship earlier in the day, hadn't you? You were on the ship, weren't you?

A. No, sir, I was on the wharf, on the aft end.

Q. You didn't go aboard at all until after the accident happened?

A. No, sir.

Q. Well, when you first came up to the dock, starting your gang, do you know whether the steam
117 was on before the accident?

A. No, sir, I don't.

T. J. ANDERSON, a witness for Respondents, was duly sworn, and testified as follows:

Direct Examination.

Questions by Mr. Rayzor:

Q. Your name is T. J. Anderson?

A. Yes, sir.

Q. What is your business?

A. Marine Surveyor.

Q. How long have you lived in Galveston?

A. A little over 30 years.

Q. Have you been engaged in the surveying business during that 30 years?

A. Yes, sir.

Q. What was your business before you became a Marine Surveyor?

A. I was originally a marine engineer ascending to superintendent and then from that to Surveyor.

Q. During your experience as a marine engineer and as a surveyor, have you had any occasion to supervise and see the operation of various winches on various ships?

A. Yes, sir.

Q. Have you made a survey of the winches on the Steamship Edgar F. Luckenbach?

A. Yes, sir.

Q. Do you recall when that was?

A. Well, the first time about three months
118 ago and more recently when the vessel was in port.

Q. Are the winches that are used on that ship typical cargo winches?

A. Yes, they are very common.

Q. Did you observe anything extraordinary about the lever or any other parts of that winch?

A. No, sir.

Q. Are all winches on ships, are or are not—if you can answer the question—on ships equipped with a device to hold the actuating lever on neutral or not?

A. No, they are not all equipped with a device of that kind.

Q. From your experience with ships, what percentage of them would you say are equipped with such devices?

A. A very small percentage.

Q. Did you at the time you testified about having made this survey, make an inspection of the port winch at hatch No. 3 on this ship?

A. Particularly, yes, sir.

Q. From your experience, would you or would you not say that that winch was reasonably safe to be operated and reasonably suited to discharge the duties or work to which it is put?

Mr. Price:

I object now to the answer unless all the conditions of the winch or the purported winch that he is to testify about are stated to the witness.

The Court:

I think he should not just give his opinion any way. He should state the facts that he found there, so that the Court could judge whether his opinion was reasonable, after he gave it.

Q. Did you find any facts in the examination of that winch that would lead you to believe that it was
119 unsafe for operation or unsuited for the work to which it is put?

A. No, sir.

The Court:

I don't think that helps you any; you are just going at it negatively instead of positively. I mean, let him describe the packing in the winches, whether he examined the packing in the lever and all those things.

Mr. Rayzor:

I am going into all those details.

The Court:

I don't think he can ever give an opinion as to what a reasonably prudent person would have done what was done there because that is the ultimate question that belongs to the Court and the jury, that is what you are trying to give.

Mr. Rayzor:

I beg your pardon, I asked him whether the winch in its mechanical condition, from a structural condition was reasonably safe. And the witness was allowed to testify to that same question, the surveyor yesterday was allowed to testify that the winch was dangerous.

The Court:

He testified first the conditions from which he inferred the danger. Then I can judge whether it is or is not. I think it is correct for the witness to give his opinion after stating what was in the winch and what wasn't in the winch, and whether the presence of those things made the winch safe or dangerous, but not whether a reasonably prudent person would consider it safe or dangerous. It would just leave me in the dark as to why he thinks so.

Q. Captain Anderson, at that time you made your first survey, was that on the trip before you
120 last went on the ship, or not?

A. Yes, about three months ago.

The Court:

About three months ago?

A. As near as I remember.

The Court:

That's the first time you made the survey?

A. Yes, sir.

The Court:

What is the relevancy of a survey made three months after the accident?

Mr. Rayzor:

The depositions there before the Court were taken two or three days after this survey was made. The Chief

Engineer testified that the stop valve had not been touched before this injury and was in the same condition then that it was in, had not been removed.

The Court:
All right.

Mr. Rayzor:
He also testified that the same actuating valves were in that winch then at the time the testimony was taken as at the time this accident occurred.

The Court:
Of course, that is very weak testimony, I mean, an opinion given on a condition, maybe 12 months after an accident. It has got to be founded upon the Court believing exactly what the engineer said, but I think it is admissible, if you expect me first to say that the engineer was right, that the thing was exactly like it was, and then if it was, his testimony is valuable. Go ahead.

Q. Did you examine the stop valve on the feed line that leads into the port winch at Hatch No. 3 to determine whether or not it was leaky?

A. I manipulated it, opened it and closed it.

Q. Was that stop valve leaking when it was
121 closed?

A. No evidence of it.

Q. Did you or did you not operate the actuating valve?

A. Yes, sir, I was familiar with the accident; the chief engineer had told me what happened.

Q. Don't tell anything that happened.

A. And I naturally looked over the handling devices, such as the valve you speak of and the lever.

Mr. Rayzor:

I am not clear about what one witness testified yesterday. I don't think he made it clear about some valve leaking. It is not clear in my mind whethed he intended to confine his testimony to the stop valve or to the actuating valve on the winch.

The Court:

I thought he was talking about the stop valve.

Mr. Rayzor:

It is not clear, so I would like to ask leave of the Court to put in the testimony concerning that actuating valve, because I don't think the record clearly reflects it.

The Court:

All right.

Q. Are you familiar with the type of valve that is used on this type of winch?

A. To which valve do you refer, sir?

Q. The valve connected with the actuating lever?

A. Oh, the operating valve?

Q. The operating valve?

A. It is a piston valve.

Q. What you call a picton valve. Have you made a diagram of that valve?

A. Yes, sir.

122 Q. Have you it here with you?

A. Yes, sir.

Q. Will you please get it. Is this a diagram that you have prepared yourself?

A. Yes, sir.

Q. Is that drawn to scale or not?

A. That is to scale. The valve is to scale, full size.

Q. Did you or did you not examine the parts of the

valve on that winch to ascertain if this is the correct kind?

A. No, I didn't strip the winch. I examined a spare valve that the engineer had on board.

Q. Is it the same kind of cylinder and valve that works on the port winch hatch No. 3?

A. From the evidence that I could see, it was exactly the same.

Q. The same kind that works on the rest of the winches?

A. Yes, sir.

Q. Mr. Anderson, what does the white piece of paper represent?

A. It represents a piston valve.

Q. And the yellow card-board represents what?

A. The body of the valve, the casing which holds it.

Q. And what do the horizontal lines drawn and designated by steam represent?

A. They are the steam ports, inlet ports.

Q. And what does that part of the yellow paper marked "steam, inlet port" represent?

A. That is at the point where the steam comes from the line to body of the valve, around this bot-
123 tom space of the valve, right in there, yes, sir.

Q. Now, when is that lever on center, what would be the position of the valve when the lever is on center, the actuating lever?

A. About the position you have it in now when the ports are closed.

Q. When the ports are closed. Now, if that valve is moved down, what happens?

A. You open steam to the bottom.

Q. To the bottom ports?

A. In here, it comes in here to the bottom, that is the exhaust.

Q. Now, what happens to the top port, what function does it have when the valve is lowered?

A. The steam comes out down through this valve and out through this hole here, the exhaust port.

Q. Does the top port then act as an exhaust port?

A. Both exhaust and steam.

Q. Then where does the exhaust go?

A. Down through those red lines, that is a hollow space, and out through here.

Q. Through the exhaust holes through the valve itself, represented on the white card by the red dotted lines?

A. Yes, sir.

(By the Court):

Q. Why is it necessary for the steam to go out through the exhaust through the top ports?

A. No other way for it to come out, Judge.

(By Mr. Rayzor):

Q. Where is the exhaust pipe fastened unto this valve cylinder?

124 A. At the bottom.

Q. Shown as—

A. As "Exhaust condenser."

Q. Shown on the card board as "Exhaust condenser"?

A. Yes, sir.

Q. Where does the steam come into the valve cylinder?

A. Right here, it is not shown, but if this is a section, it would be right in the middle here.

Q. Is that shown by the place marked steam in that port?

A. Yes, sir.

Q. Now, with the valve on center, where is the steam pressure on that spool valve?

A. All on the internal envelope of the valve.

Q. Now, is the same pressure on both sides of the valve around the center core as there is on this feed line leading into—

A. Yes, sir, it should be if it balances.

Q. Now, if you move the valve down, does the steam come from the middle section, does the steam come from the sections, cut out of the valve down through the port and start the winch?

A. Yes, comes in here and comes in this winch here, a cylinder on each side.

The Court:

How does the steam get up here to go into the exhaust; I want him to testify, how does the steam come from— Here's your space for your live steam and when you drop this lever down—

A. (Interrupting.) The lever is up now, sir.

125 Questions by the Court:

Q. I don't understand what you mean when you make a movement to pull the lever down that the lever is going up?

A. Well, the man has his hand on the lever and this shoves this valve down, there is a fulcrum on this lever.

Q. Oh, this is the valve here? This don't show the lever?

A. This don't, no, the stuffing box would be on the top, sir.

Q. Now, when he pulls his lever up—

A. (Interrupting.) The valve goes down.

Q. The valve goes down and lets steam into the winch, is that right?

A. Yes, sir.

Q. Now then, what do you mean by the exhaust, how does the steam get up there that goes out of the exhaust? I don't understand what you mean by that.

A. Well, there's a pipe from here leading to the valve, exhaust passage is open and it comes out and down here. This steam is forcing it out. It has done its work.

(By Mr. Rayzor):

Q. Does this live steam here, does that enter into the main cylinder?

A. Yes, sir, from the valve, from the valve casing into the main cylinder.

Q. After that steam has done its work, where does it go?

A. It pushes the cylinder down and comes out here.

(By the Court):

Q. There's an arrangement there for the steam to come back—

A. (Interrupting.) It is very difficult to follow. Each side of the winch there's two pipes, they
126 come like this. I will show you the hand sketch of the point of the winch and you will see better.

Q. I think—without showing the sketch, I think I understand the principle, if I understand what you mean, the live steam goes to a cylinder which moves the winch and then there's a place provided there after it has finished its work to go into some pipe—

A. (Interrupting.) Into the exhaust port and passes out down here.

Q. Now then, when it goes the other way, do the valves act opposite?

A. This way.

Q. Now, when you are raising this,—

A. (Interrupting.) The steam is in here, the exhaust comes out here and goes straight out, does not go through the valve at all. You see that is blind at the top except the stuffing box.

(By Mr. Rayzor):

Q. Mr. Anderson, with that valve on center with the ports covered, assuming that the valve is not defective or leaky, the winch won't move, will it?

A. It will just simply be full of steam.

Q. Now, assuming that the valve should be worn on both ends, what effect would that condition have, how would that affect the lever staying on center?

A. It would not affect the lever at all. The steam would fill all these spaces and naturally find its way through the exhaust, if it leaked out here it would go out here and if it leaked out here it would go out here and it would fill the cylinder as well with such volume as it had.

127

Q. Suppose there is a leak along the sides of this lower valve, suppose there's a leak along both sides of the upper valve, would or would not—assuming that they are worn the same, the steam pressure coming in from the live intake port, counter-balance the tendency of that, counter-balance the effect of that valve leaking?

A. It would just be balanced, the steam on both sides of it.

Q. Now, what would be the effect if one end of the valve was worn worse than the other end, would the winch then start?

A. No, but the steam would go into that end of the winch, whichever end was worn, but it would not be of sufficient volume because if it leaked in there, it would leak in here.

(By the Court):

Q. Leak in where?

A. In the exhaust passage.

Q. In the exhaust passage as well as into the supply pipes?

A. Yes, sir.

Mr. Rayzor:

We offer this in evidence as an exhibit and ask that it be marked for the purpose of identification. (B and C.)

(By. Mr. Rayzor):

Q. Did you make an examination of the lever on the port winch at Hatch No. 3 to see whether or not that lever was balanced?

A. Yes, sir.

Q. If, on account of excessive vibration, or someone moving against the lever or some external force, the winch should be jarred while the stop valve is open, with the lever on center, what would be the tendency, which way would the control lever tend to move, down or upward?

128 A. It would drop down, I think.

(By the Court):

Q. According to whether that ball on the other end was heavier than the handle, wouldn't it?

A. I tested that, sir. I took the pin out of the control end, and the lever dropped; it didn't slide; it just dropped down.

Q. So that the handle wasn't balanced then?

A. That was without steam, I should say, sir.

(By. Mr. Rayzor):

Q. When the winch is connected, the short end from the fulcrom is connected with the valve stem, did you state that the lever would have a tendency to drop down, didn't you?

A. I took the pin out of the valve stem and the lever dropped down.

Q. Did you examine any of the winches where the lever was connected with the valve stem?

A. Yes, sir.

Q. What was the tendency of those levers?

A. I didn't see any of them drop down; I didn't take any more pints [pins] out, but I should imagine there would be a tendency for them to drop down.

(By the Court):

Q. What do you mean by took a pin out; these things are now provided with a pin to hold them?

A. I took it out; that was holding it on the end of the stem; here's the fulcrum and the thing dropped down.

Q. I mean, it is now provided with a pin that holds it on center?

A. A pin that lifts the valves.

Q. I don't understand that.

A. Just this way.

129 (By Mr. Rayzor):

Q. You disconnected the control lever?

A. Yes, sir.

Q. On the side of the fulcrum?

A. Yes, sir.

Q. Near the valve stem?

A. On the valve stem.

Q. You just disconnected that lever from the valve stem, is that right?

A. Yes, sir.

Q. And that's the point you have reference to?

A. Yes, sir.

Q. Capt. Anderson, which way was that winch, port winch at Hatch No. 3 wound when you saw it? What you mean by that is, what would be the effect on a sling when the lever is moved down with live steam in the winch?

A. Oh, it would slack away.

Q. And when the lever is raised, the sling goes up?

A. It picks a load up.

Q. Could that winch be wound in any other way than that?

A. It could but it would be disastrous.

Q. Why would it be disastrous?

A. The line would file the guard on the drum.

Q. What would be the effect of that?

A. It would tear the line to pieces and wear the guard.

Q. Did you examine that guard on that winch?

A. Yes, sir.

Q. State to the Court whether or not it showed any sign of having been worn by the cable?

A. No evidence of it at all, sir.

130 Q. In the absence of the lead ball the Court asked you about, would there be a greater tendency for the lever to drop down than there is with the lead ball on there?

A. Yes, sir.

Cross Examination.

Questions by Mr. Price:

Q. Mr. Anderson, you say your examination was made about three months ago?

A. Approximately; I don't know the date, sir.

Q. And your testimony then is based on the conditions as you then found them?

A. Partly then and partly this last trip she was in.

Q. The last trip which was less than three months ago?

A. A few days ago.

Q. Now, you say when you took the pin out,—I don't know whether the Court understood that—

The Court:

I did not. I want to find out, I don't know what that pin has got to do with it. That is not the pin you have been inquiring about?

Mr. Price:
No, sir, this is a different one.

Q. Now, when you took the pin out, the lever dropped down?
A. Took the pin out at this end that you had here, yes, sir.
Q. Then the lever dropped down?
A. Yes, sir.
Q. But you relieved that lever of the weight of this here cylinder or spool when you took the pin out and of the stem itself, didn't you?
A. The lever was just hanging in the ful-
131 crum there.
Q. In other words, you only had the weight of your lever without the weight of your cylinder?
A. Yes, sir.
Q. So it wasn't balanced, at that time?
A. No, sir.
Q. It couldn't be.

The Court:
Why did you take the pin out?
A. Just to verify that fact.

(By the Court):
Q. Why wouldn't it have verified it better to have left the thing on the balance like it was when it was operating?
A. I did try that, sir, tried it with my hand, with the steam on to find out if it was free or stiff.
Q. (Interrupting). Without taking the pin out?
A. Yes, sir, and I estimated it took about 20 pounds to lift it.
Q. Awhile ago when you said you took the pin out, you said it was not balanced?

A. It was riding free then, there was no steam attached to it then.

Q. When the steam was on, it was just as easy to go up as it was to go down?

A. Just about the same.

(By Mr. Price):

Q. This exhaust port, did you inspect the steam line, the exhaust line on these winches leading into the exhaust line that goes back to the condenser?

A. Yes, I followed them along the deck, yes, sir.

Q. Does the exhaust from all of these winches
132 lead into that one exhaust pipe?

A. All that I saw does.

Q. Now, would you say that is only so of those on the forward end of the ship or were the winches on the aft end of the ship, do they go into that same exhaust pipe?

A. No, that is a separate pipe from the engine room, running one aft and one forward.

Q. Now, with one of the other winches running and that used steam flowing back through that exhaust pipe down to the condenser, wouldn't that have a tendency to suck the steam out of this here exhaust pipe and relieve the pressure on the bottom of that cylinder?

A. Sure, that is what it is for, the condenser.

Q. Now, on top of this valve there is a gland there?

A. Yes, sir, stuffing box.

Q. You haven't shown that on this drawing?

A. No, sir.

Q. A stuffing box?

A. Yes, sir.

Q. And you put packing around that, that is the purpose, to place packing around there, isn't it, Mr. Anderson?

A. Yes, to make it steam tight.

Q. To make it steam tight. Now, if a winch is used for sometime, that packing wears away and the steam escapes up through that—

(A. (Interposing.) That stuffing box. If it is permitted to wear very badly, then it will escape through.

133 (By the Court):

Q. What would be the effect of that steam escaping here on the operation of the winch?

A. Just that much pressure lost on that end of the winch.

Q. And that wouldn't have any effect in moving the winch at all? You mean, there is that much steam escaping from work or that in escaping it would tend to move the winch?

A. The condition would not be preceptible, sir.

Q. What I mean is, does that escaping you are talking about have any effect on moving the lever of the winch?

A. No, the lever would move free, I should imagine, because there would be no friction with the packing, because it is so slack.

Q. You mean it would be easier for the lever to move if the steam is escaping?

A. Yes, sir.

(By Mr. Price):

Q. I want to ask you this also, if that steam as it escapes up around the cylinder and out through the packing, if that wouldn't exert some pressure on the valve itself?

A. It will release the pressure, it wouldn't exert any.

Q. Well, it would change the direction of it, wouldn't it?

A. No.

Q. Wouldn't it change the direction of the pressure?

A. No, it would minimize the pressure in the interior of the valve.

Q. Now, you said that many ships come in with winches without a definite device to hold the lever in neutral?

A. Plenty of them.

Q. A very simple matter to provide a device that will hold that lever in neutral, isn't it?

A. Oh, yes.

Q. Rather inexpensive too, isn't it?

134 A. Simple.

Q. All the work can probably be done aboard of any ship, they have the tools and the material with which they can bore a hole and cut a piece of iron to put a pin in it, haven't they?

A. Sure.

Q. You have been on some of the other Luckenbach ships too. Now, isn't it a fact, that the operating mechanism on the winch of the Edgar F. Luckenbach, this ship that we have been trying this case about is different than the operating mechanism on the other Luckenbach ships?

A. Some of them are different, yes sir.

Q. Some of the other Luckenbach ships have a ratchet that when the lever is put in neutral, it can't move either way unless somebody deliberately moves it isn't that so?

A. Yes sir.

Q. Now, there is a large number of ships that come in with a definite means of holding that lever in neutral, isn't there?

A. Yes, sir.

Q. Isn't it a fact that practically all of the Shipping Board ships have that means provided to hold the lever in neutral?

A. Well, the means is provided, but it is usually out of action; it is there.

Q. It is usually provided, you say?

A. It has been fitted, but it is not in action in many cases.

Q. Now, there are a lot of ships that come in here that have no definite means provided but the winches are of such a construction that none is required,

135 that is a fact too, isn't it?

A. Yes, sir.

Q. Now, I want to ask you another question: What changes could be made on the intake port or means of permitting the steam to get into the operating mechanism of the winch that would cause the movement of the lever to be different than it is now?

A. I don't quite understand you, sir.

Q. Well, you say when the lever goes down, the load goes up, and when the lever goes up, the load goes down? Now—

The Court:

Wait a minute; I thought he said the other way, when the lever goes down, the load goes down; when the lever goes up, the load goes up.

Mr. Price:

Yes, that is correct.

A. Yes.

Q. Now, I want you to say whether any change in the method of taking the steam into the winch could be made that would reverse that?

A. Well, if you turn the valve upside down, possible it would do it.

Q. Yes, sir.

A. I mean the entire body of the valve.

Q. The entire body of the valve?

A. Yes, and have the lever at the bottom instead of at the top.

Q. Well, that is not what I mean; of course, I understand that if you turn the valve upside down, then you would have to turn the winch upside down, wouldn't you?

A. Well, you could do that too, possibly, but it is sort of far fetched.

136 Q. But I am speaking of the method of taking the steam into the steam port itself so as to cause the steam to go up on the top and then out through what is now the intake port.

The Court:

Take a reverse action to what it does now. You fill the steam at the bottom, it does one thing, and at the top it does another?

A. Yes, sir.

Q. It lifts from the bottom and presses down on the top?

A. There is no reverse gear at all on the winches from this valve.

Q. I am asking you if it could be changed?

A. I don't know sir.

Q. I am asking you if it could or could not. You say you don't know whether it could.

(By Mr. Rayzor):

Are you acquainted with the classification of the Edgar F. Luckenbach in Lloyds'?

A. Yes, she enjoys the highest classification in Lloyds and the American Bureau.

Q. What does that mean?

A. It means in the brief word she is everything that she is everything that she should be to enjoy such a class.

Q. And how often is she required to be inspected to get that classification?

A. Well, at any port a surveyor may look at her but at definite periods she has to be thoroughly gone over, stated periods.

Mr. Rayzor:

I am not clear, I don't think it amounts to a great deal, about the rules of practice in this court. In some courts you offer in evidence excerpts from standard works. I think I have heard you say to use it
137 in argument; but I have a little excerpt from a standard maritime work.

The Court:

I don't know of any principal upon which that book would be evidence. It may be it is.

Mr. Rayzor:

I recall this Court ruled one time in the Glasgow Maru case that we should read from the book in our argument.

The Court:

I said I certainly would receive as parts of an argument the view of men with intelligence but I don't believe that the book itself is evidence of anything because—I think it can be in connection with the testimony of witnesses, I think it is proper to have them testify as to what certain authorities hold. I don't think it makes any difference. If these people don't object, you can put the book in evidence, or you can refer to it in the argument.

Q. Captain Anderson, have you examined any maritime works, works on maritime matters to see what the definition and meaning is that is attributed to the term "mousing?"

A. Yes, sir, I looked it up.

Q. What work did you look it up in?

A. In Capt. Paasch's book known as "From Truck to Keel," everything in the ship.

Q. Is that a recognized work?

A. Yes, sir, it is in about four or five languages, the definition, names of everything and their uses.

Q. Did you make a copy of the definition given by the term "mousing?"

A. Yes, sir.

138 Q. Have you got it with you?

A. Yes, sir.

Q. Did you correctly copy it from that?

A. Absolutely.

Q. Will you please read it to the Court.

A. Under the heading of the word mousing it says "The operation of fastening a small cord or line across the upper part of a hook from the point to the back thereof to prevent the block or sling from unhooking."

Q. Captain Anderson, in the course of your dealings, have you had considerable experience with mousing hooks, and so forth?

A. Yes, sir.

Q. What is the purpose stated in your own language from knowledge gained from your experience what is the purpose of a mousing on hooks?

Mr. Price:

If the Court please, they have just put in evidence this eminent authority, I don't know who he was. He said that the purpose of the mousing was to prevent the hook from slipping out, from coming unhooked.

The Court:

I think that is plain from everybody that has testified from the humblest sailor, that that is the purpose of it; just like a clasp on a diamond pin.

Mr. Rayzor:
I don't think it is clear at all; I don't think there is any other witness on the witness stand who has made it clear.

The Court:
Well, your "lugubrations" have not made it clear to me. I think everyone has said just what this man said; if he don't make it clear no one has.

139 Mr. Rayzor:
I don't think there has a witness testified according to that definition.

The Court:
There has not been a witness who has taken a different view.

Mr. Rayzor:
There was one witness who testified it was put on there to hold the weight of the chain.

Mr. Price:
I disagree with counsel.

The Court:
If it had been in the sense that you are talking about, it is to hold the weight of a block or sling, it is to prevent the thing, if it should turn up from hopping out of there. Anything that would cause the chain or block, whatever was in the hook from trying to come off the end of the hook.
Thats all it is.

Mr. Rayzor:
I would like to ask this witness the question.

The Court:

Go ahead and ask the question.

Q. Are mousings from your experience put on hooks to keep the hooks—to keep the chain from popping out of the hook or to hold the entire weight of the chain?

A. Just simply as a precautionary measure to prevent it from dropping out or slipping out when it is not in tension.

Q. Sir?

A. When the load is put on, when it is slack.

Q. Are they put on there to hold the weight of a chain that might be used?

A. No, sir.

Mr. Price:

Now, may it please the court, I must object to the competency of this witness along that line. I don't object to his competency as an engineer and
140 surveyor, but I don't recall that he has qualified as a deck officer and sailor or seamen.

The Court:

Overrule the objection.

(By the Court):

Q. Captain Anderson, if you start out to do anything, your purpose is to try to do what you try to do, isn't it?

A. Yes, sir.

Q. Now, if you are putting a mousing across a hook, the purpose is to prevent the chain or rope or whatever is hitched in that hook from coming out, isn't it?

A. Yes, sir, if the court will permit me, it is largely for positions where the chain is not in tension, is lowered down, the sling would naturally fall out, and it would entail an additional duty to put it back; it is a very temporary thing to tie a piece of string on a hook.

Q. That is the way it is usually done, but if people are going to be—

A. (Interrupting) It musn't be put on permanently, because it has to be removed quickly thats the reason it is put on with cord.

Q. Suppose you have got a heavy chain on there, and it would hit against the cord and knock it out, that is not a—

A. (Interrupting). If a heavy chain is put on there, it would knock it out.

Q. Then why is it put on?

A. Just as a precautionary measure, to prevent shaking out or falling out.

141 Q. Then it really does not prevent a chain from breaking it out?

A. Many times it doesn't.

Q. It is a poor protection then?

A. It is as old as the hills.

Q. Well, now, this particular accident, you being as expert as you are, the court will call upon you for an opinion. According to the evidence in this case, I will give you the hypothesis of it; in some way that nobody knows the block or a hook in which this chain was hung, started up or got up from where it was suspended against the boom from which it hung with such force that it was jammed up against the boom and the chain fell out, the hook was turned over and the chain fell out. Is there any way from your examination of that winch for that block to have run up there and tipped the chain over, or hook over, without the winch turning?

A. Not that I can see, sir.

Q. So the thing is bound to have occurred because the winch got in motion some way?

A. Yes, sir.

Q. That is inevitable?

A. I can't see any other way, sir.

Q. Now, what ways were there for that winch to get in motion; I don't mean that; from your handling of the winch, tell me all the ways in which that could have occurred.

A. The controlling lever must have been out of position or moved out of position if it was ever in position before the steam was turned on.

Q. You mean by position, off center?

A. Off center, yes, sir.

142 Q. Then if the controlling lever got off center, so that there was an opening for the steam to come in and the steam came on, that winch might turn up or down either?

A. It depends on which port was open, sir.

Q. So that if a particular port was opened, it could move just as easily up as it could down?

A. Yes, it could.

Q. Well, that has cleared up one thing in my mind that I thought you all were confused about?

A. I mean, the winch would go just as easy one way as the other.

Q. That is what I thought, but I thought somebody testified differently. Then could the steam have been on for an hour before this thing occurred and then the thing occur?

A. No, sir.

Q. Is it not the reasonable conclusion about the matter that the lever was off center in some way and that the stop valve was open and the steam was turned on and when the steam went on, the thing occurred?

A. That is what I think.

Q. Isn't that the way?

A. I think so.

Q. Isn't that the only way it could have occurred?

A. Thats the only way I could imagine it could have occurred.

Q. It couldn't have been on for an hour without taking effect and then suddenly take effect, could it?

A. I don't think so.

Q. One witness testified, you all have got the
143 rule, if you don't mind me telling him so, if you do, I will make a hypothesis,—one witness testified that the winch was right at the hatch over which this block was suspended; the witness said it was as close as from where you are to where I am; could it have been possible that a person working around there, lifing the tarpaulin off of the hatch or working in any place could have come in contact with the lever of the winch?

A. Yes, they might have done that.

Q. Close enough for the thing to have happened?

A. Yes, you can see by the other photograph sir, how close it is.

Q. I don't see the hatch?

A. May I show you? This is the hatch.

Q. Oh, it is?

A. This is the valve down here, in fact to get to the valve myself, I had to sit on the hatch to reach the valve.

Q. So that the lever might have been on center and someone might have knocked against the handle of that winch?

A. It is 5 foot 2 long.

Q. And started the thing? That could have been done?

A. Yes, sir.

Q. Of course, if that handle had had a pin or some stopping device, it couldn't have been done?

A. Not so easily.

Mr. Rayzor:

Your Honor, the Court has raised one question there, I would like to ask him a question there to clear up. I

don't object to the question. I think my question is objectionable—in answer to the one you asked.

144 The Court:
If you think it is objectionable—

Mr. Rayzor:
The Court asked objectionable questions. He says it is for the information of the Court.

The Court:
Well, you ask it and if I rule on it, you might cite me as an authority against my own ruling.

(By Mr. Rayzor):
Q. Captain Anderson, the Court asked you awhile ago if you thought it were possible for the steam to have been turned on for an hour and the winch to have started of its own accord and you answered it no.
A. Not, if the valve was in a mid position as it is when set.
Q. It is possible that the steam could have been turned on an hour and somebody could have opened the stop valve and the winch started an hour later?
A. Now then, comes the question of where did you turn the steam on; where you are speaking of turning it on.
Q. Suppose the engineer turned it on in the engine room, in the boiler room an hour before the thing happened?
A. And if the stop valve at the winch was closed, the winch would stand still.
Q. And the only way it could have started, would be somebody opening the stop valve?
A. Yes, the control valve to that winch.

Q. Or the control valve, the actuating valve being off of neutral?

A. Yes, sir.

The Court:

I was just following up the theory that I thought you were developing that the winchman went off and left the valve open.

145 CAPT. H. H. PYLE, a witness for Respondents, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rayzor:

Q. Your initials are H. H.?

A. H. H.

Q. Pyle?

A. P-y-l-e.

Q. Are you an officer of the Texas Contracting Co.?

A. Manager of the Texas Contracting Co.

Q. How long have you been working with those people, Capt. Pyle?

A. 7 years, nearly 7 years.

Q. How long have you been supervising the work of stevedoring on the Edgar F. Luckenbach?

A. Since the steamer first came here about the early part of 1922, I think it was.

Q. Do you recall when the Libelant in this case was injured? You heard the testimony. Do you recall when the Libelant was injured?

A. Yes.

Q. Were you on the ship at the time?

A. No.

Q. Were you on the ship the day before?

A. Yes.

Q. Were you on the various parts of the ship the day before, or just one particular part?

A. All over the ship.

Q. Is that a part of your duty?

A. Yes.

146 Q. Did you observe the operation of the winches the day before?

A. Yes.

Q. And the port winch on Hatch No. 3?

A. Yes.

Q. State to the Court whether or not it worked satisfactorily?

A. Quite satisfactorily.

Q. Were you aboard the day of the accident?

A. At about 9 o'clock, a little after 9 that morning.

Q. When you came on board?

A. When I came on board, yes.

Q. State whether or not they used the port winch the day after the accident?

A. When I came on board at 9 o'clock the work was going on as usual. The winch was in operation and working splendidly.

Q. It has worked satisfactorily ever since?

A. Yes, sir.

Q. I mean since the boat had been in here?

A. Yes, sir.

Q. Capt. Pyle, are you familiar with the character of gear that was used on the port winch at Hatch No. 3 at the time this accident happened?

A. Yes, sir.

Q. How long have you been in the stevedoring business?

A. About 7 years, that is connected with this firm. Prior to that I was at sea for 34 years.

Q. 34 years?

A. All the time connected more or less with stevedoring.

Q. While you were at sea, did you have any

147 occasion to use mousing on hooks considerably?

A. Yes, very common.

Q. Is the character of chain and hook that you were using here the kind of chain and hook that is usual and customarily used in loading and discharging cargo?

A. Yes, specially constructed for the purpose for which it was being used.

Q. Capt. Pyle, in your opinion, is or is not it possible to put a mousing on that lower block that would hold a chain, the weight of the one you were using at the time the Libelant was injured in the event the block turned upside down?

A. Not if the block was inverted.

Q. Is it possible to put a mousing on there to hold that character of chain?

A. No, not if the block is inverted. It will in all probability pull off the hook.

Q. Now, have you got a sketch of that showing the kind of chain that was used?

A. Yes.

Q. Showing the kind of chain?

A. A pretty rough sketch and the mousing and the gear.

Q. This is the gear?

A. Yes, sir.

Q. You haven't got the sling?

A. Yes, there's the sling.

Q. But you haven't got the chain, that fell?

A. That's the chain and that is the hook.

Q. How deep was the hook that you were

148 using from which the chain fell?

A. On the inside of the hook about four inches from the bend to the point.

Q. I will ask you to mark on this exhibit "hook" at the point where the chain fell, from where it fell, is this the hook or this one?

A. This is the hook, it is the same thing.

Q. Just mark "hook" designating the hook out of which the chain fell. Now, according to this diagram there's a ring which went over the hook and down the inside of it?

A. Yes, sir.

Q. Now, what would be the effect, how much pressure would be exerted on that mousing if the chain were lowered to the wharf for instance, and the chain hit the wharf and there was some back action against the hook, how much pressure would be exerted on that?

A. The hook or the rign would turn over with very little pressure.

Q. As long as that chain is properly handled, is there any way that the entire weight of that chain would go against that mousing?

A. No, it is not there for that purpose.

Q. And is it or is it not true that the only way the weight of the chain could go against the mousing would be when the chain has been inverted?

A. That's the only way I can see.

Mr. Rayzor:

We offer this in evidence and ask that it be marked for identification. (Exhibit D.)

149 Q. Capt. Pyle, have you examined any of the winches aboard the Edgar F. Luckenbach to ascertain whether or not the lever has a tendency to drop down when there is no live steam turned into the valve on the winch?

A. Yes.

Mr. Price:

Wait just a minute; no time being stated, I want to object, when he made the examination.

The Court:

I don't think it makes any difference, he just says the lever will drop down if there is no live steam in there.

Q. What was the result of your examination?

A. The result of my examination was that the amidship winch on this No. 3 hatch, the lever dropped by itself. The winch in question that was on the port winch of the ship, the lever would not drop—neither go up nor down, probably due to the packing in the bland being too tight.

Q. To some extent the ease with which a thing moves up and down is determined by how tight the packing is in the packing nut?

A. It would have an effect, certainly.

Mr. Price:

Now, may it please the Court, I understand the rule in admiralty is there is only one expert allowed on each side. I don't want to be objecting necessarily but I don't want a preponderance of experts against us.

The Court:

Where do you find that rule.

Mr. Price:

It is a well known rule.

The Court:

Who made it?

Mr. Price:

I believe the Supreme Court made it; it is in the Supreme Court Admiralty rules.

150 The Court:

I've got a rule in this Court in Equity, in a patent case only one expert is allowed on each side. That is a pretty good rule. I don't think this man is an expert, he is just a general witness. I would overrule your objection if I had the rule.

Q. I understand from your observation when the packing nut is limbered up, the tendency on the winch would be that the lever would drop down?

A. Yes, sir.

Cross Examination.

Questions by Mr. Price:

Q. Now, Captain, you said that you examined that amidship winch at this hatch?

A. Yes, sir.

Q. And when the steam was not on, that lever dropped down?

A. The lever dropped down, yes.

Q. Well, if the steam had been turned on the next morning, then that winch would have started and unwound itself, wouldn't it?

A. Not, if the stop valve was closed.

Q. Of course; but if the stop valve was open?

A. If the stop valve was open, certainly.

Q. And it would have turned around and wound itself back up the other way, wouldn't it?

A. Eventually, of course.

Q. Well, wouldn't you say it would be rather a dangerous thing then, where the steam was shut off, when the levers have a tendency to drop down, wouldn't it be a dangerous thing to turn the steam on those winches in the morning without somebody going around
151 and putting the lever back where it belongs?

A. No, not if the stop valves are closed. No steam can get to the winch.

Q. But assuming that the stop valves are opened, or if they don't know whether they were opened or closed, it would be different, wouldn't it?

A. If the stop valve is open, most decidedly any winch will start when the steam is put on.

Q. What was the weight of that chain, Captain?

A. About 45 pounds.

Q. About 45 pounds?

A. Yes, sir.

Q. Now, how much does it take to hold 45 pounds up, how much of a rope yarn or how much of a piece of wire, or whatever you might use for mousing, how much would it take to hold 45 pounds up?

A. You mean inverted, with its entire weight? It all depends on the material.

Q. Well, how much of a piece of rope would hold 40 or 45 pounds up?

A. What kind of rope?

Q. Well, a rope yarn, how many double turns of an old rope yarn would it take?

A. I wouldn't guarantee any old one to hold it up.

Q. You wouldn't?

A. No.

Q. How about a piece of wire, how much of a piece of wire would it take to hold 40 pounds up? Now, let me ask you, assuming that a winch started and it run so slow that nobody saw it running, it made no
152 noise hardly and carried the block up to the end of the boom and then the block capsized?

A. Yes.

Q. How much of a mousing would it take to hold that chain on the hook?

A. Purely conjectural.

Q. Yes. You don't want to say, do you?

A. I don't know. It all depends upon the construction of the hook. If there was very little lip on the hook, it would slip off.

Q. Now, let me ask you this, this hook looks a little more like a hook. Now, the point of this hook sets out there, doesn't it?

A. Yes.

Q. Can you draw a better hook than that?

A. No.

Q. Well, maybe I can draw one, I don't know. Now, that is a pretty fair hook, isn't it? Now, Captain, if you put a mousing across here, isn't it impossible for that mousing to slip off of the hook, due to the fact that the point of the hook, the lip of the hook extends out this way and the back of the hook is being in the other way?

A. Was the hook in question bent in that way or the block which was in use at the time?

Q. Well, we don't know that.

A. Neither do I.

Q. That was your ship. I asked you if that was the kind of a hook?

153 A. You could make a hook and you could put a wire lashing there that would hold that chain but it is not usual in practice, the mousing is put on not for the purpose of holding the chain when the hook is inverted.

Q. Well, there is some dispute about that in the testimony in this case. Now, if he may put a wire mousing on there and make two or three turns around the hook this way, and then bound it around the other way and fasten it on there, isn't it a fact that that would hold far more than 40 or 45 pounds?

A. Not necessarily.

Q. If the hook was tipped up?

A. I don't know.

(By Mr. Rayzor):

Q. The ship furnished the winches?

A. Yes, sir.

Q. The ship furnished the steam?

A. Yes, sir.

Q. The ship sent an oiler around and a deck engineer around to oil the winches?

A. Yes, sir.

Q. Your men operated the winch?

A. Yes, sir.

Q. And your men removed the hatch covers?

A. Yes, sir.

Q. And your men worked on deck the ship?

A. Yes.

Mr. Rayzor:

That's the conclusion of our testimony, Your Honor.

Mr. Price:

Now, I would like to ask counsel for the respondents to state to the Court the real party at interest
154 in this case.

The Court:

I don't understand what you mean. I don't know what interest the Court has got in the real party; you have got three parties here.

Mr. Price:

If Mr. Rayzor is in this Court representing the insurance company that has insured the Texas Contracting Co. and the Luckenbach Steamship Co. jointly, then in the event of the insolvency or inability of someone of these parties to meet any judgment that the Court might give if the Court should give any, we would have the right to look to that company under the law of the State and of the United States.

The Court:
Look to what company, the surety company?

Mr. Price:
Yes, sir.

The Court:
Without it being a party to this suit?

Mr. Price:
Without it being a party to this suit. We could sue them later on that.

The Court:
I don't know anything about that kind of law, but I will entertain any motion you make.

Mr. Price:
I have no motion to make. I call on the attorney to state it, and if he don't—

The Court:
All right, he is called on. What are you going to do?

Mr. Rayzor:
There's three of us in this case, Wm. Parr & Co., which counsel alleges is a partnership, which has been admitted; the Texas Contracting Co., a corporation organized under the laws of Texas, which has been admitted; the Luckenbach Steamship Co., a foreign corporation, or-
155 ganized under some laws, but we have admitted it is a foreign corporation.

The Court:
All three under the jurisdiction of this Court?

Mr. Rayzor:
Yes, sir, have appeared here and answered.

The Court:
What has the question of insurance to do with it?

Mr. Rayzor:
I don't think it has anything to do with it.

The Court:
At any rate, you decline to say whether you are representing an insurance company?

Mr. Rayzor:
I can't decline to do that, I am representing the Luckenbach Steamship Co., and the Texas Contracting Co.

The Court:
He says he is satisfied whatever way you desire to do, decline to answer it or answer it.

Mr. Rayzor:
I decline to answer it. We represent the Steamship Co. and the Texas Contracting Co. and Mr. Royston can speak for himself.

The Court:
Does that satisfy you? If you want to make some more motions—

Mr. Price:
That is all right, we are satisfied with his answer.

Mr. Royston:
I represent William Parr & Co.

Mr. Price:
I didn't have reference to you.

The Court:
As the matter now stands, if I find for the Libelants I will not find anything against Parr, and I think the record clearly shows that and I know that's the case. Now, is there any other evidence for the Libelant in rebuttal of evidence brought out by the Respondents or the claimants, or whoever they are?

156 Mr. Price:
I don't think we have anything further.

The Court:
Then you rest too?

Mr. Price:
We rest too.

Mr. Rayzor:
I would like to ask leave of the Court to file an amended libel setting up the amounts paid Libelant up to the time this suit was filed.

The Court:
I will give you that right. You mean, it hasn't got anything to do with the question of liability at all; it is just on the question of damages.

Mr. Rayzor:
Yes, sir.

The Court:
You understand what he means?

Mr. Price:
Yes, sir.

The Court:
He wants to show in dimunition of any judgments, what he has paid.

Mr. Price:
Yes, sir.

157 Galveston, Texas, Feb. 15, 1926.

Testimony adduced before the Court on the issue of damages.

DR. JESS A. FLAUTT, called as a witness on behalf of Libelant, testified as follows:

Direct Examination.

Questions by Mr. Price:

Q. State your name please.

A. Jess A. Flautt.

Q. Are you a regularly and duly licensed practicing physician under the laws of the State of Texas?

A. I am.

Q. How long have you been such, Doctor?

A. Since 1911.

Q. In the course of your professional practice, have you had occasion to treat a man named Karl Buzynski?

A. I have.

Q. When did you first see Buzynski after he was injured, Doctor?

A. I believe it was on the morning of October 25, 1924; it was a very short while after he was hurt.

Q. At any rate, on the same day that he was hurt.

A. Yes.

Q. Now, I wish you would state to the Court the result of your examination of Buaynzki the first time you saw him, Doctor?

A. Well, when I first saw him, he had a dislocation of the right hip which was reduced under an anaesthetic and an X-ray taken immediately afterwards and he was put to bed in St. Mary's Infirmary.

Q. Is that all that was done with him at
158 that time?

A. Reducing the dislocation, yes, sir, the proper measures of giving something for pain and the nursing orders and treating shock, he was suffering very much from shock for about 5 days.

Q. Now, I wish you would state to the Court the condition you subsequently found him in, state the developments of the injury, the nature of them.

A. May I refer to my records for that.

The Court:

Yes, sir.

A. Well, may I read a report here that I made to Dr. Singleton for his guidance when he saw him in connection with me; that brings up the different developments of the case?

The Court:

I have no objection. How does counsel feel about it.

Mr. Rayzor:

We object to the introduction of it, being a self-serving declaration and not a part of the res gestae.

The Court:

Upon that objection, I will sustain it.

Q. You may just refer as you go along, just refer to your notes and then state what you found without reading from it.

A. Yes. Well, for the first five days, he had an almost complete paralysis of the intestines and bladder and it was with very great difficulty that we got him to expel any gas, he had to be catheterrized a number of times a day and he suffered intense pain in the region of his liver, all over the right side and the interior surface of the liver. After the 5th day he began to improve. Now, on the 9th of November against my advice he insisted on going home as he claimed that the nurses at the hospital were not strong enough to handle him on the
159 bed pan and things like that, and he was carried home in the ambulance. Now, of course, he was placed in bed and they gave him the best attention and care they could. On the 28th of November, he developed piles. He had never had any trouble like that before, and he had not—

Mr. Rayzor:

I object to his statement that he never had anything like that before unless the doctor has waited on him all the time since the man has been in Galveston, that is a conclusion of the witness without any premises at all on which the conclusion is based.

The Court:

The objection will be sustained to that as a conclusion, it is an obvious conclusion.

Q. At the time you first examined him, Doctor, did he have piles then?

A. I made no particular examination to look toward that. I don't remember whether I examined his rectum or not; I believe I did but I don't remember.

Q. Well, it was sometime afterwards that he complained of piles, did he?

A. Yes, the 28th of November, when he first called my attention to it.

Q. Now, just go on from that point with your testimony.

A. Well, he continued to go along about the same until the 8th day of January, 1925, when he called me out, he had an acute attack of indigestion from which he suffered considerably from gas and cramps. He was given a dose of salts I believe for that, and on the 10th day of January I went to see him and he was very much jaundiced and his urine was full of bile salts.

Q. Full of what?

160 A. Bile saltz. The salts for bile made up in the liver showing that they were being absorbed into the blood stream and carried through the system in place of going ahead and producing their normal function.

Q. Proceed.

A. Now, another doctor saw him at this time. Would I be allowed to—

The Court:

You can only testify the condition of him and what you saw.

Q. Just testify what you found and what you saw and we will cover that later.

A. The examination, of course, showed him very much jaundiced and an acute and enlarged liver and the different digestive trouble that go with jaundice and the damage to the liver. Now, do you want what I think caused that?

Q. Yes, we want you to now give us your opinion as to the cause of these conditions that you have just testified to.

A. Well, in my opinion, the man received a severe injury in the back, enough to dislocate his hip—

The Court: (Interrupting):

Now, what objective symptoms of the injury did you find?

A. Yes, sir, the bruises across his back; outside of a dislocated hip and a leg all twisted out of place, there wasn't very much to be seen at the time.

The Court:

Was there any evidence of trauma on his back?

A. Yes, there were several large bruises.

Q. Where?

161 A. Over the right side of his back, and over the pelvis. Now, in my opinion this bile and jaundice were an aftermath of damage that he received in the liver at the time of the accident. I believe that possibly he had some hemorrhage in the liver and that that caused a damming up of the blood, and the blood from the rectum first showed up as piles and afterwards due to the rectum or something else produced this jaundice. Now, that jaundice lasted a few days, about a week as I remember it, and cleared up. Well, since that time the man has been able to eat very little, strained soups, broth, eggs, milk and a little toast. I attribute that to the fact the liver plays a very large part in the digestion and that the liver being damaged the man is unable to eat certain types of foods; for instance, he can't eat a piece of meat; it throws him into an acute attack of indigestion. Now, that jaundice passes off and the digestive troubles for the last six months have improved a little. Now, about the first of March I was out and Mr. Buzynski complained to me that he had lost the sense of feeling in his legs, in both legs.

Q. Now, up to that time, had Buzynski been able to walk?

A. No, sir, he hadn't been out of bed.

(By the Court):

Q. The hip fracture, did that not heal?

A. Oh, the fracture? It was dislocated and the X-ray showed it to be, but on account of the intense pain and the condition of the man, I didn't see anything to gain by letting him up. I thought it would be better and in my opinion he had received this severe injury to his liver and possibly some other internal organs and
162 there was no necessity for letting him up and my first opinion was that it would be six months to a year before he would recover from that.

Q. Before he would recover from what?

A. From the damage to the liver and to the back.

Q. Now, what I am trying to get at—you know the whole case and I don't—had that fracture healed?

A. Oh, it was not a fracture, it was a dislocation.

Q. Had that dislocation been reset.

A. Oh, I reduced that at the time, immediately after I saw him.

Q. There was no condition of bone fracture or bone dislocation with him and hasn't been since immediately after the accident?

A. No, sir, the X-ray was taken immediately afterwards and it showed no evidence of any fracture of the pelvis or the lower part of the spine.

Q. Well, why didn't you have him,—he could walk?

A. No, ordinarily you wouldn't let a man that had a dislocated hip attempt to walk.

Q. For how long a time?

A. Well, I usually keep them in bed for anywhere around three months. You see, if you had a fractured hip, the large bone fits down like that in a socket. Now,

the X-ray showed that a part of the top of this cavity that the hip bone fits into had been broken off. Now, there's some very powerful muscles and ligaments that hold that joint into place, that hold it in a socket. I don't know whether you have ever seen a skeleton or knew how it is. Well, I have made a rule in all of my cases to keep them in the bed for about four months to
163 give this capsule that holds the head of this large thigh bone a chance to completely heal.

Q. Now then, when that was healed, why didn't he get up?

A. Well, when that was healed, because the man claimed he was in too much pain in his stomach and particularly all over the right side, particularly the liver.

Q. Wouldn't it have been a proper treatment for him to move around a little, a man can't get a very good metabolism lying in bed?

A. No, he can't get a very good metabolism, but in my opinion he was better in bed than attempting to get up.

Q. The ordinary advise would be, if he could, to move around a little to help his circulation and help his digestion, wouldn't it?

A. Yes.

Q. To help the condition of liver action?

A. If there wasn't anything else.

Q. Now then, that is what I am getting at, what was it that kept him in bed after his hip fracture was reduced and the union had occurred, after four months you found nothing wrong?

A. Not there, no sir.

Q. Then why was it you didn't tell him to get up and move around a little?

A. On account of pain in the back and pain in the right side.

Q. He complained of that?

A. Yes, sir, from the first; in fact, he insisted for several months that there must be some fractured ribs.

Q. You couldn't find any?

164 A. No, sir.

Q. These were muscular pains in the back?

A. Well, they were deep seated pains, I don't know what was causing them. In my opinion they were caused possibly from some damage to the liver.

Q. But you couldn't in any way find out, you couldn't get any ocular evidence of anything wrong with the liver?

A. Nothing except his digestive trouble and the jaundice.

Q. That was cleared up?

A. The jaundice cleared up but the digestive troubles haven't.

Q. Wouldn't a man lying in bed worrying over the fact that he had the accident and nothing to do, wouldn't he have a bad digestion?

A. Yes, in a large number of cases that would interfere with his digestion.

Q. I would I know. But you think he didn't have indigestion due to the fact that he had himself on his mind about 150% and nothing to do?

A. No, sir, I don't believe that.

Q. You don't?

A. No, sir.

Q. You think that indigestion was due to some derangement of some organ and you think it was the liver?

A. Yes, sir.

Q. You know, ever since they knew there was a liver, they have been laying everything on the liver, the Greeks more than we do; you just mean by "liver," you

165 just mean generally that there were some secretions that he ought to have to keep up and maintain a proper metabolism and give him a proper

body growth, something was wrong but you don't know what it was?

A. No, sir.

Q. Did you find anything that you could run down and say?

A. The biggest part of the digestion is carried on in the intestines, certain types of food are digested in the stomach and others are prepared for digestion in the small intestines, but principally it is more of a mixer up and liquifier for the food as this food leaves the stomach and goes down into the intestines, a large amount of bile is poured out from the liver.

Q. That is just physiological?

A. Yes.

Q. Well now, what I mean is, with that in your mind, did you take any X-rays of his colon or his lower intestines or anything to show whether there were any obstructions there?

A. There was no evidence of any—

Q. (Interrupting.) You never had any plates made of his intestines to see whether there were any obstructions or anything at all?

A. There has never been any evidence of any obstructions in his intestines.

Q. So you don't think there is any ground to charge the intestines with any trouble he is suffering from?

A. No, sir.

Q. Of course, it is a fact, isn't it, that piles are usually the result of constipation?

A. In a majority of cases.

166 Q. Then how can you, with a man lying in bed, taking none of the ordinary stimulants which the liver has to properly produce the bile. I mean by exercise and activity, and not even having the right kind of foods which would tend to increase it, how are you able to tell just where the trouble was? What evi-

dence did you have by which you could diagnose and locate the trouble? Did you take any analysis of his blood as to whether his blood was over-acid or what the condition was?

A. At the time he was in the hospital, his blood, his kidneys and blood pressure and all of that were normal. Now, when the piles developed, I only made a note on my records because I didn't know what was causing it, but after the jaundice developed, in my opinion it was caused by the damming up of the blood. You see, the blood from the lower part of the body comes back and goes through the liver. Now, any obstruction would tend to produce the damming up of that blood and piles is nothing but a varicose vein and that would be one of the first places that would show.

Q. How long was it before they were eliminated?

A. They are not as bad now as they were, no, sir.

Q. Now, what kind of efforts are you making to assist nature to perform the ordinary eliminating functions, are you giving him purgatives, or what?

A. Yes, sir, I gave him, at the present time for that I am giving him a preparation of caroid and bile salts. The caroid is a bile digester and in combination with the bile salts, I am giving him the bile salts with this caroid in it and he seems to be doing fairly well on that.

Q. Oh, yes, I interrupted you when you were
167 talking about his legs, I think I've got an idea now of your general treatment for his bowels. Now, the feeling in his legs, when did that show up?

A. About the first of March he complained of loss of feeling in both legs and on examination I found that that loss was complete from the knees down. That is, he could feel no sensation when you stuck him with a pin. It was rather complete on the outside up to the hips. Most of the anterior surface was complete. There was some sensation on the inside. I mean, he feels some

pain on the inside and also on the scrotum he feels some pain and the reflexes were—the knee reflexes were exaggerated. Now, that might have been present sometime before, but that was the first time that he called my attention to it.

Q. Well, what could that be due to, what did you attribute that to?

A. Well, at that time I attributed it to some injury or depression on the cord from the accident.

Q. From the what?

A. From the accident; an aftermath from the accident.

Q. Well why? How would any blow delivered at the place you are talking about produce that temporary paralysis or partial paralysis?

A. Well, there are a number of forces that might do it. There might be a compression, there might have been a hemorrhage, or there might have been a damage to the cord, what they call a myelitus, an inflammation of the cord, which was not complete.

Q. An inflammation of what cord?

A. The spinal cord.

Q. You think there might have been some
168 direct or indirect injury to the spine from the blow?

A. Yes, sir.

Q. That you say was your impression in March. What did you do to isolate it and determine the cause, if you could? Did you do anything?

A. All that you could do was to test out the reflex. I had called in another doctor; I had called him before this; one representing the insurance company.

Mr. Rayzor:

We object to the doctor talking of another doctor representing the insurance company; he doesn't know who he represented.

Q. What doctor do you mean?
A. Dr. Joe Jones.

Mr. Rayzor:
He is not employed by us.

The Court:
Whether he was employed by the insurance company or not is immaterial: I will exclude that statement, and also as to what Jones found, but you can say you had him examine him, and leave Jones out; whatever he did he will have to testify to himself.

Q. Did you form any further conclusion?
A. Why, we came to the conclusion that he had either received some severe injury to the cord, or some compression, or there was some condition there that was stopping that part of the cord from performing its natural functions and that it was not complete.
Q. Did you get at any way to relieve that?
A. There was nothing that we could do to relieve it. From an examination of the spine, there was
169 nothing that we could find there to cause it; if it had been caused from some injury to the cord, it produced an inflammation, myelitus; or if it was due to hemorrhage there is no other measure that I know of that would have benefitted him.
Q. From that time on, did his condition remain the same, or change?
A. That part of his condition has gradually grown worse. That is, at first, he could move his legs somewhat, but there was a lack of coordination. I think in the last six months that has gradually grown worse; in fact, I am sure it has.
Q. Now, is there any other thing that could have caused that except a blow?

A. Well, there's possibly a number of things that might have caused it.

Q. What are those symptoms? If you hadn't heard the history of the blow and the man had those symptoms, what would you have attributed it to?

A. Well, the first thing I would think, possibly syphillis.

Q. Is that the way that manifests itself?

A. Well, at the start of the case it would have looked like that, but the way the case has advanced, no.

Q. Did he take any Wassermann?

A. Yes, he has had a Wassermann.

Q. You had one made?

A. Yes, sir, it was negative.

Q. You say it was negative?

A. Yes, sir.

Q. When was that made?

170 A. That was made a short while after the accident.

Q. Now, outside of that then, which you say the test showed negatively on, what else could have caused that condition?

A. Well, any condition that could injure the cord; of course, it is possible for tuberculosis; it is possible for malignancy; any number of things.

Q. You think there is no question that whatever the cause of the condition that the condition is some injury to the spinal cord?

A. I do, sir.

Q. You think that is what he is suffering from, an injury to the spinal cord?

A. Yes, sir.

Q. Received either as the result of this blow or from some other source of injury to the cord which might have caused it, but there is no doubt that the seat of that injury from your standpoint is in the spinal cord?

A. Yes, sir.

Q. Did you make any tests,—is the loss of feeling in his legs and particularly below the trunk—

A. (Interrupting.) It is almost complete. There's certain nerves that were not caught. You see, the injury is not complete. If he had had a complete injury across the cord, there would have been a loss of sensation all the way and movement and everything else, but there's only certain parts of that cord that's hurt. Now, the local part where the sacral nerves come off, apparently are not involved. It may be something higher up.

Q. What do you mean by "sacral" nerves?

171 A. "Sacral," it supplies nerves for the scrotum and the inside of the leg and the back of the leg and so on.

Q. That is still all right?

A. That is, the sensation there is still pretty good.

Q. All of the trunk, there is no indication of paralysis?

A. No, sir.

Q. Any part of the trunk?

A. No, sir, no trouble whatever there.

Q. And that is possible to have a blow on the spine destroy certain nerves?

A. A certain part of the cord.

Q. And manifest itself that way without injuring any other part?

A. Yes, sir.

Q. Now, what is the course of such a trouble?

A. Well, in my opinion,—you mean the life expectancy?

Q. No, what effect will that have? Is that completed, and will show no more effects, or is it progressive or what?

A. I believe that he has less use of his legs; in fact, I am sure that he has less use of his legs than he had some six months ago.

Q. Well, wouldn't that come from lying in the bed so long?

A. Well, it might, except the way that he handles them; he doesn't handle them as well as he did; he was at first able to handle them—I don't believe staying in bed has caused it; but for the last six months we have had him up in the chair, oh, practically every day and he attempts to wobble around on crutches.

Q. Now, when I tried the case before, he apparently couldn't sit up, he was brought here lying on his back.

A. Well, he can't sit up; he's got to have a
172 chair and a part of his bed to get himself up.

Q. But he can sit up in the chair just like anybody else?

A. Yes, but it takes him some several minutes to get up; he has worked out a system of his own where he catches hold of the iron bed in one hand and a chair in another and worms himself around until he manages to get up.

(By Mr. Price):

Q. Doctor, how long could he sit up that way in a chair?

A. A very short while; he has intense pain after sitting up just a few minutes.

(By the Court):

Q. Where does that pain come?

A. That pain is in his back.

Q. Well then, his back hurts him when he sits up?

A. Yes, sir.

Q. So that there's a loss of sensation below but an increase of sensation above?

A. Yes, sir, that is from the pain standpoint.

Q. Now, what makes that pain come in his back, just the lack of the use of those muscles or weak muscles?

A. Well, that is a possibility, but I believe it is due to the damage.

Q. Any man that lies long in the bed takes a long time to strengthen up his back muscles; take me today; I can't sit up forever without my back getting tired; I will tell you so, but I am not testifying; any man who sits a long time in the same position, his back must be—

A. (Interrupting.) Yes, sir, but I think this is entirely different.

173 Q. Now, he has been in bed now how long?

A. He has been in bed since the 25th day of October, 1924, but he is up every day.

Q. Up for a little while?

A. Yes, sir, he gets tired lying in bed; he gets up for a few minutes; then he goes to bed and he gets up again.

Q. Never has tried to walk?

A. Yes, he has tried to walk.

Q. With crutches?

A. Yes, sir.

Q. You have given him crutches?

A. Yes, sir.

Q. How recently?

A. Oh, he has had crutches for quite awhile now.

Q. Is he walking any at all on his crutches?

A. With very great difficulty; he wobbles like a wood horse, he can wiggle himself around.

Q. He moves entirely from his arms and not the legs at all?

A. Why, he can move his legs but he has no sense of feeling. He says they don't feel like they are his legs. Part of his hip muscles are still all right. He can put one forward and the other wobbles something like a walking doll, very unsteady.

Q. Could he feign that condition?

A. I don't believe he could.

Q. Did you make any tests which would determine whether or not there was any feigning in it?

A. Well, I have watched him pretty carefully and I have had other doctors out to see him and talked that over with them, but I have seen no evidence of
174 feigning. In fact, the man, I believe, wanted to go back to work. When I told him at first it would be six months to a year, he laughed at me. He figured that in four or five months he would be back on the wharf working.

Q. What is his age?

A. I believe he is 64 now; I believe he was 63 when he was hurt.

Q. Did you know anything about him before the injury?

A. I have seen him off and on.

Q. You had never treated him before?

A. No, sir, I never. At one time I was physician for the longshoremen, of which he was a member, but so far as I know he never came up to see me.

The Court:

All right, go ahead and examine him.

Questions by Mr. Price:

Q. Doctor, how do you find his health other than results coming from the liver or the injury to the liver or his spinal cord?

A. You mean, his heart and kidneys?

Q. Yes.

A. Good.

Q. Now, another thing I want to ask you, was there anything in his urine that indicated an injury to his liver as well?

A. He developed an acute—about the first of April, he developed an inflammation of the bladder and that is

present today, and it may be gone tomorrow and it may stay off for a week or so, or it may come back and stay for a couple of weeks. Of course, I keep him on medicines to help that all the time.

Q. In other words, this inflammation of the bladder appears and disappears?

175 A. Yes.

Q. Now, what in your opinion is the cause of that?

A. Well, I was of the opinion that that possibly might be that certain nerves of the bladder were affected, but it is a possibility that that can be an inflammatory condition, cystitis; that is due just to his weakened condition; in fact a number of conditions might cause him to have a systitis.

Q. Now, how long has he been under your care, doctor?

A. Since the day he was injured.

Q. And how many times a week do you visit him?

A. I usually go out—of course, that varies, usually about every two or three days. The first five days, I saw him five or more times a day. Then I saw him every day for awhile, and now I see him every two or three days.

Q. And you also furnish him with medicine that he uses and has been using?

A. I am. I have furnished him with medicine since the 13th of June.

Q. Since the 13th of June?

A. Yes.

Q. Does his condition require that he take medicine constantly?

A. It does.

Q. Now, what is there about his condition that requires him to take medicine constantly?

A. Well, the preparation that I am giving him is just a urinary anticeptic. I have tried him on pretty nearly

every one on the market and I have found one that keeps him in pretty good condition; my directions are
176 to take that four times a day. Now, as I mentioned awhile ago, I keep him on caroid and bile salts. The bile salts is just the salts that they take from the liver of an ox and combine that with caroid, which is a vegetable digestive, which seems to keep him fairly comfortable.

Q. Now, Doctor, from your knowledge and the history of Buzynski's injury, is he or is he not permanently crippled or permanently injured?

A. I believe he is. I believe he is permanently injured.

Q. Now, has he paid you for your services in the matter, Doctor?

A. No, sir.

Q. I wish you would state to the Court your charges for attending to Buzynski for the length of time that you have already stated?

A. It will be somewhere near $700, charging the regular fee of $2.50 for calls, first aid, and what medicines that I have bought for him. I believe it is $682.50.

Q. Did you at any time examine Buzynski with another doctor besides Dr. Jones?

A. I did.

Q. What is the name of the doctor?

A. Dr. Huddleston and Dr. Singleton.

Q. And recently with Dr. Singleton?

A. Yes, sir.

Q. Do you know the occasion for Dr. Huddleston examining Buzynski?

A. Why, Dr. Huddleston saw me and told me. (Answer continues.) He had a letter from Mr. Rayzor requesting that he get in touch with me and go out and see Mr. Buzynski, and I told him I was only too glad to have him go out.

Q. Do you know whether or not Dr. Huddle-
177 ston made a report to Mr. Rayzor at that time?

A. He told me he did.

Q. Now you never saw the report?

A. No, sir.

Q. Now how long will Buzynski have to continue to take medicine, Doctor?

A. I believe he will have to continue it for the remainder of his life.

Q. Do you know the average expectation of life of a man 63 years old, according to the American experience table of mortality?

A. I do not.

Q. Well, in your opinion, how long will Buzynski live, bearing in mind his present injuries, and his good health in general except with reference—well, how long would he have lived had he not received these injuries?

Mr. Rayzor:

Your Honor, we think that that is hardly a question to ask; it is based on the doctor's conclusion, and the proper way to prove, we think, the average life of a man is by the mortality tables, and not by the opinion of a doctor, based more or less on surmise as to how long any individual will live.

The Court:

I don't understand that to be law at all. I understand the law on the contrary, that the mortality tables are not admissible in evidence. I would like to see your authorities. I understand the Courts have held that the mortality tables are not admissible in evidence; they are a mere compilation. The Courts of Texas have held that they are a mere compilation made up by some-
178 body; that the jury can determine from their own experience; they don't have to have any

evidence; it is a matter of their opinion and experience from the facts. That is my recollection of the law. I know it used to be held, the defendants used to try to use that thing, get that mortality table in. I think the Courts exclude it. You say you have authorities holding that the only way to prove that is by mortality tables?

Mr. Rayzor:

No, sir, I haven't. I think this is improper. That he is attempting to testify concerning that matter which the Court is to determine from the various pieces of evidence, the question of how long a man will live is a question of fact; it does not require professional knowledge. Professional knowledge can't aid in that matter.

The Court:

I think he can clearly testify as to how long a person with a certain illness, with a certain condition, how long from a medical condition, how long that condition will exist, before death will ensue, or he can testify that that condition, so far as medical knowledge goes, has nothing to do with the duration or prolongation of his life. Possibly he has two questions in one. He started off by asking him how long he should live under present conditions, and I think you abandoned that, didn't you?

Mr. Price:

Yes, sir.

The Court:

The question now before the Court is, if he hadn't gotten the injury—

Mr. Price:

(Interposing) how long in his opinion he would live.

The Court:

I am a little unclear on that. I know I can reach my own conclusions without anybody's evidence at all. Hasn't the matter been discussed somewhere and decided, whether a person can give an opinion?

Mr. Price:

A physician can give an opinion on the probable extent of a man's life; he is the only one who can. Now, the American experience table of mortality is merely made by an actuary who may not be a physician at all. It is just a matter of figures. Now, the American experience table of mortality is not the absolute limit of a man's life.

The Court:

I will agree with you on that.

Mr. Price:

It may be used in arriving at the conclusion as to how long a man will probably live.

The Court:

What I am asking you is have the Courts ever decided whether or not any person, a physician or any other person, is competent or is allowed to give an opinion from his experience or from his study of experience, of the probable duration of a human's life. I should think he should be allowed to do it, but if the authorities say he ought not, I would like to hear it.

Mr. Price:

That is what the authorities say, your Honor, and there isn't any other way—

The Court:

I think I know what they say. Go ahead with your physician's opinion. I will overrule the objection.

Mr. Rayzor:
Note our exception.

Q. Do you know what is the common ordinary life expectancy of a man of 63?
A. I do not.

The Court:
Just his opinion. Just what he thinks would be inadmissible.

180 Q. How long in your opinion will Buzynski live, I want to put it two ways, in his present condition?

Mr. Rayzor:
Now, Your Honor, we make our same objection, because he is going back to the Doctor's personal opinion.

The Court:
I think that objection is good in view of the statement, —he has already stated that he is not able to give a general opinion as to a man's expectancy; now I think your question ought to be whether and to what extent this injury will affect or shorten his life.

Mr. Price:
Well, I wanted to do that, but I perhaps used the wrong method.

Q. First I will ask you Doctor, how long in your opinion will a man of Buzynski's constitution live, what would be the duration of his life, how many more years, bearing in mind that he was 63 years old at the time of the injury.

The Court:

He has already stated that he doesn't know what the expectancy is and it would be a mere guess by him as to whether or not he would live a certain time; as to his expectancy, according to the experience tables.

Mr. Price:

No, I didn't ask him that; I said, have you formed any opinion as to the ordinary expectancy of a man of that age, not the tables?

A. No, sir.

Q. Now, did this injury to Buzynski materially shorten his life Doctor?

A. I couldn't say; if he will do like I want him to do, that is, provided I continue to treat him and
181 nothing else shows up, it should not shorten his life very much I wouldn't think.

Q. Now, another thing, Doctor, will Buzynski require the attendance of someone on him constantly, that is, other than a doctor, say, for instance a nurse? I don't necessarily mean a registered nurse, but somebody to attend to that man's wants?

A. Well, he now has his wife that does all that.

Q. But it will require someone to attend to him that would not have been required, had it not been for the injuries?

Mr. Rayzor:

We haven't made any objection to counsel leading the witness. The witness has answered counsel once and now he is stating the thing in different fashion in leading form. I think it is a little improper for him to lead his own witness. We object to the question and the answer.

The Court:

Well, I think it would be well to give the doctor a chance, and not take all the testimony on yourself, Mr. Price. Let him do a little testifying. I will sustain the objection to the form of the question. It is distinctly leading and suggestive; and the answer.

Cross Examination.

Questions by Mr. Rayzor:

Q. Dr. Flautt, will you be kind enough to give me the X-ray pictures you made?

A. They are at St. Mary's Infirmary.

Q. Did you make an X-ray picture of the man's vertabrae to ascertain whether or not there had been any fractures in the spine?

A. The X-ray was taken by Dr. Crutchfield and so far as I remember, that was his report, that is what I put on my records.

Q. Doctor, do you mean to tell the Court
182 that you don't know whether or not there was any fracture in any of the vertebrae?

A. I say, Dr. Crutchfield reported to me that there wasn't the lower part of the vertabrae; he didn't examine the higher vertabrae.

Q. And you were content to rest with that report?

A. That is all that I had to go on.

Q. Will you please give me the report of the Wassermann test that you made?

A. Yes, I can give you that.

Q. Did you make it yourself?

A. No, sir.

Q. And you didn't make the X-ray yourself?

A. No, sir.

Q. Will you be kind enough to furnish a copy of the urine analysis you had made?

A. That, I suppose, will all show up on the records at St. Mary's infirmary.

Q. You didn't make that analysis yourself?

A. I have made a number of them since at my office, but not the original one, no.

Q. You say the Wassermann showed negative?

A. Yes, sir.

Q. Did you make a puncture of this man's spine?

A. I did not.

Q. Doctor, isn't it a fact that oftentimes if a man has an old case of syphilis—

183 Mr. Price: (Interrupting):

May it please the Court, we object now to any reference in this case to syphilis, the same old story to prejudice the Court and the jury.

The Court:

It won't prejudice me.

Mr. Price:

To bring out that a man is suffering from syphilis or some other disease. We have offered them the man. He has been examined time and time again.

The Court:

I can't see, Mr. Price, when the Court is searching for cause, as far as the equipment of the Court will permit, why the Court ought not to be as open-minded to scientific investigation as anybody else. I've got no prejudice—of course, if the man is proven to have had syphilis, if that is proven as a fact, while I haven't got any prejudices against him in a moral sense, I would certainly take that into consideration.

Mr. Price:

Well, the only purpose of it, Your Honor, would be to prejudice either the Court or the jury.

The Court:
No.

Mr. Price:
Because, if a man did have it, it is the law that if it was lying in him dormant and by reason of an injury, negligently received at the hands of another, that person is liable for all the damages. That is the law, and there can be no purpose other than to prejudice.

The Court:
Then you say that if a man had syphilis and no ill effects developed from that syphilis of the nature claimed in this case and he had a knowledge of, that the law declares that if syphilis then showed up, it must be irresistably held to have been the result of the injury.

Mr. Price:
The result of the injury.

184 The Court:
Well, that may be the law but I've got to get the facts in order to apply the law to it. The evidence must be admissible unless you can prove—of course, I can see that if a man had a latent trouble and the injury caused the trouble to become active, and it would not have become active otherwise, they've got to take the responsibility for it. I will overrule the objection.

Q. Doctor, isn't it a fact that oftentimes if a man has an old case of syphilis, that it is necessary to make a puncture of the spine before you can ascertain whether or not syphilis is present?
A. It is.
Q. Isn't it a fact, Doctor, that when Dr. Huddleston came to see you that he requested that a puncture of the spine be made?

A. No, sir, he requested that Buzynski be put in the hospital where he could, if necessary, puncture that, and have X-rays and other measures that he wanted.

Q. Well, he did ask you to put him in the hospital?

A. He did.

Q. Where he could make a puncture of the spine?

A. He did.

Q. Make a blood test?

A. He did.

Q. And urine test?

A. Yes, anything that you thought necessary.

Q. Did you put him in there?

A. I did not. He wouldn't go.

Q. Doctor, how long have you been treating industrial cases here in Galveston?

A. Since 1912, with the exception of the time
185 I was out during the War.

Q. I presume during that time you had several cases of dislocations of hips??

A. I have.

Mr. Price:

I can't see the relevancy of that question, Your Honor.

The Court:

I think the whole inquiry is relevant in order to test the doctor's means of information and his conclusion. I am to an extent helpless in a case where a physician testifies, because while I can do ordinary reasoning, I think, as well as they can, I am compelled to accept a great many conclusions which they base on premises which I do not clearly understand, and in order for me to get as close as I can to an understanding of the premises and the processes of their reasoning, I want the doctors investigations and the bases of his conclusions developed, as far as can be done. I overrule the objection.

Q. (Questions read to witness.) Is that correct, Doctor?

The Court:

Well, he says he has. Go on.

Q. Will you please cite to the Court your experiences with dislocations of the hip where the dislocation has resulted in muscular atrophy, cystitis, bladder infections and chronic gastritis?

A. I don't think this dislocation of the hip had anything to do with that.

Q. In other words, this was the first case of a dislocation of a hip where all of these things concerning which you have testified have shown up?

A. In the dislocated hip, yes.

Q. That is what I am trying to get at. Isn't
186 it a fact, Doctor Flautt, that all of these things could have been brought about by some ailment that goes with old age, that was present in the man's system, but lying dormant there before this accident occurred?

A. In my opinion, no.

Q. Do you think that the injuries you have complained of must flow inevitably from this character of an injury?

A. I don't get your question. I don't understand you.

Q. You have testified about the things this man is suffering from.

A. Yes.

Q. His various ailments?

A. Yes.

Q. Do you think that those things must inevitably flow from this character of an injury?

A. I don't think inevitably, but I think in this case, taking everything into consideration, that they did.

Q. Have you ever treated a case where these things happened in the chain of sequence as you have enumerated them, like they have in this case, from a simple blow?

A. No and probably never will. I have treated cases that had an injury to their back or spine that developed one or more of them.

Q. Doctor, taking up the complaints that this man has made to you about his ailment, you say he complains of a muscular atrophy, is that correct?

A. No, sir; no atrophy.

Q. No atrophy at all?

A. Practically none; very little; I don't believe there is any muscular atrophy. The man isn't as
187 heavy as he was when he went to bed, but I believe that he has very little or no atrophy of the muscles.

Q. There has been a deadening of feeling in his legs?

A. There has.

Q. And you reasoned from that that there was an injury to the nerve that springs forth from the spinal column?

A. Yes.

Q. Well, what is the name of that nerve?

A. The principal one was the anterior crual nerve. The spinal cord comes down and at each vertabra it shoots off branches. Now, there's any number of nerves and flexes that are made up in there. Just what particular nerve, I couldn't say.

Q. Then if you had to start out to search for the cause of that numbness, you wouldn't know what to look for?

A. You can see what nerve here is affected. I can't tell just what part of his cord is affected.

Q. Did I understand you to say a moment ago that there must be some pressure on the nerve controlling those regions?

A. I said there must be some pressure on the spinal cord, some injury to the cord, or some injury that produces an inflammatory condition or something like that.

Q. Those nerves are very well protected as they leave the spinal cord, are they not?

A. Yes, sir.

Q. And you mean to say that you have not made an X-ray examination to ascertain whether or not there is any pressure on those nerves where they leave the spinal cord?

188 A. That man, Mr. Rayzor, has been at home since the date that I mentioned—

Mr. Rayzor:

Just a moment. I think the witness ought to answer the question.

The Court:

I think he is answering the question. You are arguing with him. "You mean to say why didn't you do it, you mean to say that you haven't done so and so," that is a rhetorical question, which expects the answer no, and then puts him to the explanation.

Mr. Rayzor:

(Questions read.) Just scratch out the question.

The Court:

He can just say yes, but he has a right to tell you something.

Q. Did the X-ray examination that you have testified about show any pressure on the nerves where they lead

out from the spinal cord that controlled the muscular activities in the limbs where you testified the numbness existed?

A. It did not.

Q. Doctor, isn't it a fact that there was little or no contusion at all around this man's hip after the accident?

A. Outside of a slight bruise, there was very little to see externally.

Q. In your opinion, how much of a blow, measured in pounds, would it take where the force is exerted from the back, to disrupt the kidneys and the liver of a normal man?

A. Well, I couldn't answer it that way. I would judge that a blow that is severe enough to knock a man's hip out of socket hitting him from behind, a man weighing about 195 pounds, would be sufficient to disrupt almost any internal organ.

Q. You think that would be sufficient to
189 account for all the complaints this man has?

A. I do.

Q. I believe the Court asked you if there were any other things or conditions that could bring about these complaints, did he not?

A. Yes, sir.

Q. I don't want to go back over it.

The Court:

Well, I have no objection; if you think that I have covered it sufficiently, all right, but if you don't, go into it yourself. Don't let me keep you out of it because I think it is an important matter, if I have not covered it to suit you.

Q. What kind of test did you make in order to ascertain whether or not there was any injury done to the kidneys?

A. Examined the urine.

Q. And you found—

A. (Interrupting.) There was no evidence of any damage to the kidneys. There was no hemorrhage, no blood.

Q. Then the man's kidneys are now all right?

A. Yes, the kidneys are all right.

Q. Now, please state what you did to ascertain whether or not three was anything wrong with the liver?

A. Well, for one thing the man's liver was very much too large. It hung down under the ribs. He had acute pain from the liver where it laps over the stomach in front clear around under the right side, and taking into consideration his digestive troubles and
190 the jaundice that followed, I thought that he must have had some damage to his liver.

Q. Have you ever had a case in your experience where there has been an enlargement of the liver where there has not been a blow?

A. Any number of them.

Q. Then the fact that the liver itself is enlarged, wouldn't of itself show that it was attributable to those people?

A. No.

Q. What is there about that condition that would cause you to believe as you have testified, as I understood you to testify that this condition was due to the blow?

A. Well, do you want me to give you my reason why I came to this conclusion? Just why I think that it was his liver?

(By the Court):

Q. Just why do you think the blow caused that instead of some other condition?

A. Well, in the first place a healthy man who had never been sick,—I think he said he had not been sick for years and years,—working every day on the wharf, eating everything that—

Mr. Rayzor:
Your Honor—

The Court:
(Interrupting.) He is giving you his reasons why he reached his conclusions. He is basing that upon the history that the man gave him. Any physician has got a right to give the history upon which he bases his reasons. Now, if the history is not sound, his conclusion falls.

A. Being able to do the work on the wharf, eating all types of food and everything that was necessary, to receive an injury, and this other followed so soon afterwards, why I assumed that it was due to the accident.

191 (By Mr. Rayzor):
Q. Doctor, do I understand that healthy people who are able to carry on in the usual way don't have these enlargements of the liver?
A. You didn't understand me to say that, no.
Q. Then it is possible, is it, for a man to carry on his daily activities, carry on his work and at the same time have enlargement of the liver, such as you have testified about?
A. It is.

(By Mr. Price):
Q. Does that apply to a man doing rough work, on a wharf, Doctor?

Mr. Rayzor:

Your Honor, I would like to continue my line because it is hard enough to—

The Court:

I thought you turned him over. I think you should let him do his own examination.

(By Mr. Rayzor):

Q. There was an inflammation of the bladder, I believe you testified, that came on sporadically and disappeared and came back?

A. Yes, it comes on now, comes and goes.

Q. Now?

A. Yes.

Q. When did you first notice that Doctor?

A. About the first of April.

Q. Now, do you attribute that infection to this man's injury by having been hit by an object?

A. No, I doubt if that is what caused it. At first I did think that is what caused it; it might possibly have been caused by that, but it is more apt to have been caused by an infection.

Q. What is the nature of that infection, Doctor?

A. The type of germ that causes it?

Q. Yes.

192 A. I don't know.

Q. What is the nature of the infection you found, there is no term for that?

A. Cystitis, that means, an inflammation of the bladder. I didn't have it examined microscopically to see what type of germ was producing it.

Q. That is very common, is it not?

A. It is a very common condition.

Q. And a person under normal conditions may have an infection in the bladder?

A. Occasionally do.

Q. And an infection in the bladder will not possibly prevent a man from carrying on in the usual way?

A. Well, as a rule it will, because a man with inflammation of the bladder can't hold his urine but a few minutes, and when he starts to urinate, he has to urinate right now as a rule.

Q. Doctor, it is a fact, isn't it, that the treatment for infection of the bladder is very simple?

A. Well, I disagree with you there; sometimes it is rather complicated, some of them are rather complicated.

Q. As a general rule, however, there is nothing complicated about the process of treating it and the results?

A. Well, as a rule they get well without very much difficulty.

Q. You are treating people now, are you not, who have infection of the bladder, who are going on about their business without any handicap or delays or loss of time?

A. I don't believe right at this time that I am, but I have.

193 Q. Similar infections?

A. I wouldn't say it is similar. Most of it is due to venereal trouble, most of the cystitis that I see.

Q. Is that or not about as serious as the infection this man has?

A. I don't think so.

Q. You don't think it is as serious?

A. I say, no. They respond to treatment a little bit better than his has. If you get them well once they usually stay.

(By the Court):

Q. As I understand you to say, he doesn't attribute this cystitis to the blow?

A. I said I don't know whether that has anything to do with that or not. The process of a man being in bed, he may get an inflammation of the bladder. Later, I attributed it to some damage to the nerves that supply the bladder, but afterwards I changed my opinion a little on that.

Q. You don't think there is evidence enough there by which you can as a physician trace any cause and effect from a blow?

A. No, sir.

Q. It may have been caused by many other things?

A. Yes, many other things might have caused it.

Q. That might have prevented you from concluding that that caused it, that cystitis matter?

A. No, sir.

The Court:

I don't see any use of performing with the cystitis any more then; that hasn't anything to do with his legs, has it?

A. No, sir.

194 (By Mr. Rayzor):

Q. What is the connection between the smaller intestinal system and the spinal column?

A. There is none except that the nerves supplying the intestines come off from the spinal column, part of them; part of them are sympathetic.

Q. What character of injury would a man have to receive in order to paralyze his intestines?

A. He could get a severe shock to the solar plexus.

(By the Court):

Q. Let me interrupt you there; is there any claim that his intestines were paralyzed? I didn't hear that.

A. I said that he had an almost complete paralysis of the intestines and bladder following the accident, which in my opinion was due to the shock. That cleared up in about five days and began to improve.

The Court:

I don't think five days would bother it much.

Mr. Price:

We don't make any claim on that.

The Court:

I think so. There is reason in everything; anything that went off in five days. Of course, if you can eliminate every other injury but that temporary paralysis to the bladder, I will go back and consider that. I say, if you can eliminate from the evidence, as the result of the blow, every injury except this five days paralysis, I will go back and consider it.

Mr. Rayzor:

I don't care to go into that if they haven't claimed it.

The Court:

Well, they haven't claimed it since five days after the accident.

(By Mr. Rayzor):

Q. I wish you would explain to me what chronic gastritis means?

195 A. It means a chronic inflammation of the stomach.

Q. Now, does the man still suffer from that gastritis?

A. The man's digestive troubles have gradually im-

proved within the last six months. He is unable to eat meats and greasy things. He still is on a very simple diet but he doesn't become distended and he doesn't have the cramps after eating that he did have for say the first year.

Q. Would it take a rather severe blow on a man's back, if such were possible, at all, to bring about "chronic gastritis"?

A. I don't believe that a blow on the back would bring about that.

Q. A good many people have indigestion, haven't they, Doctor?

A. I guess about 98 per cent.

Q. That doesn't shorten their lives as a general rule, does it?

A. Well yes, it does. If you want to go into that.

The Court:

I just thought it made them meaner—

A. Well, it just depends on how they carry out their diet. Old Dr. Elsner said more people dug their grave with their teeth than any other way.

Q. Now, will you just explain what the connection is between this indigestion this man complains of and this blow on the back?

A. I believe that he received some damage to his liver. Now, whether that was a hemorrhage—one Doctor I had out with me to see him—

Mr. Rayzor:

I will just ask the witness, Your Honor, to confine himself to what he knows and not what the other doctor said.

196 The Court:

All right.

A. Well, all right. I believe there was a possibility of a hemorrhage to the liver at the time of the accident. That is a possibility. Now, that producing a congestion of the liver would prevent the bile from being carried out and thrown into the small intestines as it normally should. Now, if that bile isn't thrown out in the small intestines, for instance, if you just have a small attack of catarrhal dyspepsia, it interferes with your digestion, because the biggest part of the digestion is carried out in the small intestines and it is very necessary to have the bile there to help it.

Q. Do I understand that the complaint of indigestion was based upon the claim that the liver was distorted as the result of the blow?

A. That is my assumption, yes.

Q. Now, the bladder infection, I believe we have eliminated that?

A. Yes.

Q. You say there is no muscular atrophy?

A. If there is, it is very slight.

Q. Now, there is a deadened feeling in the man's limbs?

A. Yes, sir.

Q. You don't attribute that to the muscular atrophy?

A. No, sir.

Q. You attribute that to the nerve that controls the leg?

A. Yes, to this spine.

Q. And at the spine where these nerves enter the spinal cord, you found no pressure at all?

A. No, sir.

Q. You found no pressure on the nerve?

197 A. No, as I remember it, the X-ray was taken only of the lower vertebrae. It wasn't taken of all of the spine.

Q. You said, something about hemorrhages?

A. Yes.

Q. A good many people have hemorrhages, don't they?

A. Yes.

Q. As a result of constipation?

A. Yes.

Q. You don't attribute this man having a hemorrhage to the condition of his liver?

A. That is what I did attribute it to, yes.

Q. Do you attribute that to the accident?

A. The piles to the accident?

Q. Yes, sir.

A. If my reasoning in the case is right, this damming up of the blood in the liver, not allowing it to drain through like it did, because the damming up caused the varicose veins.

Q. So you attribute that to the liver, the indigestion and the hemorrhages?

A. The hemorrhages.

Q. You got anything else that you attribute to the liver?

A. No, that's enough.

Q. Then you attribute the numbness in his legs to the pressure on the nerves?

A. The pressure or injury or some other condition.

Q. Now, outside of those things which I have tried to ask you about, are there any other ailments he
198 is complaining of?

A. Not that I know of.

Q. Does that man see well?

A. Yes.

Q. Have you examined his eye-sight?

A. Only in a general way. I haven't looked in the fundus; I haven't made an accurate test; he reads the paper.

Q. Wasn't his eyes affected by this injury?

A. He didn't complain of them; he reads the paper every day.

Q. You mean you only looked for the things he complained about?

A. Well, I watched that man carefully; I am not an eye specialist.

Mr. Price:

We don't make any claim of injury to the eye. I don't like to take up time.

The Court:

He must have some idea, nobody is claiming anything about the eye, but he must have some notion about that.

A. I have tested the eyes for vision, whether they react to light or not, whether they react to distance and things like that.

Q. You didn't find the numbness in his legs until he called your attention to it?

A. I did not.

Q. Wouldn't you expect to find under normal conditions where a man had received a severe blow on his back sufficient to dislocate and disrupt his internal organs, swell and enlarge his liver, and all the things you have testified about, some contusion more than you found in this case at the point where the force was exerted?

A. No, sir, I would not. There is no reason why I should.

199 (By the Court):

Q. You mean that the contusion that you found was sufficient to produce these results?

A. You see, being hit over the bony part of the plevis, outside of just a bruise, such as being hit with almost

anything might bruise him, you know, I see no reason why it should be marked, if it is hit with something that has rather a small surface although it does not break the skin, I see no reason why there should be very much external evidence.

Q. Dr. Flautt, isn't it a fact that you and Dr. Huddleston agreed that the only possible way you could ascertain just exactly what this man was suffering from was to take him to a hospital, put him under close treatment for a week, and take all the kind of tests that you know how to take?

A. We agreed that that would probably help us some. We did not agree that we could go there and definitely do it.

Q. But the man hasn't submitted to those examinations, has he Doctor?

A. No, he did not. He refused to. Could I tell him why he refused?

The Court:

It would be permissible for somebody to explain to the Court, if you know.

(By Mr. Price):

Q. Well, why did he refuse, Doctor?

A. Well, he is a very ignorant foreigner and he has been horribly abused in a number of ways—

(By the Court):

Q. What do you mean by "horribly abused"?

A. Well, fellows wrestling with him on the wharf and slipped his pay-roll out and little things, that they do to a foreigner.

Q. You mean by "horribly abused," you don't mean in connection with this case?

200 A. No, no. But he means he wouldn't go and have any steamship or insurance company doctors because they had cut him off from his compensation, they had stopped him from medicine, and he was afraid to go out and place himself under their hands.

(By the Court):

Q. Afraid they might not give him a fair report?

A. No, he said he was afraid that they would kill him, that is what he said, and you couldn't talk him out of it, because I would have liked very much to have had him out there and have him have all those tests.

(By Mr. Price):

Q. But those tests are not absolutely necessary, only to please somebody else?

A. Well, it would probably show us a whole lot. I don't believe that it would help the man any. Of course, they might find something that might help him, but in my opinion it would only satisfy us to a certain extent, if any. It might not find anything.

Q. It might not point definitely to anything at all. As a matter of fact, X-rays oftentimes don't disclose a fracture of an arm or a skull, unless they are very careful about taking and developing them, is that so, Doctor?

A. Quite often.

(By the Court):

Q. But as far as human instruments are able to produce reasonable accuracy, the X-ray is recognized in the profession as a satisfactory—

A. (Interrupting.) Yes.

Q. (Continuing.) And reliable test of osseous conditions, isn't it?

A. Yes, it should have shown any fracture at the time of the accident of the pelvis;—that was the
201 principal place I was having examined and it took in a lower part of the spine. It is possible if some condition should have been there—

Q. (Interrupting.) You are going on further than I inquired about. I just wanted to find out if X-rays were not a proper method of making examination of conditions in the body?

A. Oh, yes.

Q. Now, is it or not unusual for the condition of lack of sensation, which you say this man complains of in his legs, and lack of ability to move them, which you say he complains of, or evidences to exist, along with no muscular atrophy?

A. No, you see, there's two types of nerves. One of them is sensory nerves and the other one, motor nerves. Now, you might have a loss of sensation; you might have atrophy.

Q. Well, he claims to have both, he claims to have a loss of sensory nerves and motor nerves?

A. Yes.

Q. Now then, I say, can a man lose both sensory and motor nerves without having any effect at all upon the muscles that are affected by those nerves?

A. Yes, in certain cases they do.

Q. In what kind of cases?

A. Well, I am not very familiar with those nervous and mental conditions, but I know if there's certain involvement of those, you get atrophy, and if others, they don't. Now, the detail of that I don't know.

Q. Now, this condition that he has, you expect that to exist for sometime, you say it existed without
202 any loss of movement or losing his feeling, you say it would be natural for him to have this condition without those things existing?

A. In a majority of cases, they have considerable trouble, but in this case he hasn't had any.

Q. Now then, wouldn't the conclusion be from that, wouldn't the absence of atrophy be a strong evidence that he had no loss of sensory and motor nerves, and the existence of those sensations in the light of the absence of atrophy would lead you to believe he did have them? In other words, aren't the conditions which you have described almost impossible to exist?

A. No, sir; I don't think so.

Q. You have known of cases where a man has lost the functions of his nerves as to feelings and motions and at the same time no shrivelling?

A. No shrivelling.

Q. No flatness of sensation. Well, how does he keep up his appearance, how does his flesh keep up its appearance if there is lack of function or control?

A. Well, you are too deep for me, Your Honor. I am not familiar with that.

Q. Have you ever seen a case like that before?

A. I have seen some with certain symptoms that he has but not just like his.

Q. I mean, leaving out all the causes, a man unable to move his legs, a man unable to have any feeling in his legs—for how long now?

A. Since he had that loss of sensation?

Q. Yes.

203 A. The first of March, 1925.

Q. Gone on now nearly a year, and yet it has produced no results whatever in the structure of his muscles or his flesh, neither his flesh nor his muscles have shown any results?

A. Well, he has lost some weight.

Q. But that is uniform, that is not just located in his legs?

A. No.

Q. He hasn't got that shrivelled, atrophied appearance that comes from entire loss of function?

A. No, sir.

Q. You say you have never seen a case like that before?

A. No, sir.

The Court:

I had an examination made upon the request of the respondents but the order provided he would examine him not as the representative of either person. Of course, I realize that in that order, I to a small extent, reflected upon the profession, not personally, because of course if a physician examines a man, his conclusions are not affected by his employment, but practically that is not so. If a person understands the nature of the matter, he can see why it is so because diagnosis involves a great deal of thinking and thinking is often rationalization, in which a man is trying to support his beliefs. That's all that I meant; that I did not want Dr. Singleton to go into the case with any belief. I often decide cases that way. I reach a conclusion that a man ought to have a judgment or he ought not to and I do a great deal of rationalization, but I wanted Dr. Singleton to examine him—not that I had any idea that if he examined
204 him for the respondent that he wouldn't tell me the truth, but I didn't want him to go into it with any preconceived idea at all. I wanted him to go into it just as free from preconception as I am going into it. I do not know anything about it. And with that view I think I will just ask the doctor to give a statement of what he did and what he found, until he finishes; then, of course, you all can examine him.

DR. A. O. SINGLETON, being first duly sworn, testified as follows:

Direct Examination.

Questions by the Court:

Q. Just go ahead then, Doctor, and make a statement as to what you did and saw and your conclusions and the reasons.

A. I first received a history of the injury from Dr. Flautt who had been in the case from the beginning, in which he told me very much what he has recited in his testimony before the Court. This man received an injury in 1924, about October; he was knocked down by a heavy weight, which required being picked up and carried to a hospital in an ambulance; his examination revealed there a dislocated hip and X-rays failed to show any other bony injury; following this, he reduced the dislocated hip and it was successfully reduced; following that for a number of days, probably 6 or 7 days, the man had what he termed a paralysis of the bladder and intestine; as far as he knew, the sensation in his legs or an examination of paralysis was not made at that time.

Q. As far as he knew, there was no mention made of having loss of sensation?

305 A. He did not recognize whether or not the patient was anesthetic, or whether or not he was paralyzed in the lower extremities. This apparent paralysis of the intestines and the bladder lasted in the intestines for probably six days before he got the bowels to move functionally, before the normal peristalsis of the bowels and the intestines was resumed. The paralysis of the bladder lasted some time longer, requiring the drawing off of the urine for several days, and then after that the patient passed his urine voluntarily. In March of that year he says that the patient had

become jaundiced, and ran for several days, jaundiced, with bile in the urine, and then this cleared up. Since that time, he has been about the same, confined to bed, unable to move very well himself and having poor digestion. I examined him and I found that the patient was apparently well nourished. He has no deformity or abnormality that can be made out by an external examination of his abdomen. His urine is passing voluntarily. An examination for some cause of this urinary disturbance, other than probably the beginning of paralysis was made and there is no evidence of obstruction to the flow of urine as you often find in old men of that age.

Q. Let me interrupt you there; they spoke of cystitis; did you find any evidence of that?

A. The urine has some puss in it at present;—I examined his urine;—but not a great deal.

Q. You wouldn't consider that there is any serious or any disturbing condition of cystitis there? Oh, he has stated that he didn't think that was due to the blow that I am just asking you, did you find any condition that was unusual or irregular with reference to the
206 bladder?

A. A low-grade cystitis, a low-grade infection of the bladder at this time.

Q. Do you in any way attribute that—do you concur in what the other physician said that you don't think that had anything to do with the injury?

A. Well, I think his original bladder condition was the result of the injury but at the present time I do not consider his bladder condition serious.

Q. Well, go ahead, sir.

A. His muscular control of the arms is perfect and all other parts of the body except the lower extremities. There he had voluntary use of all his muscles but there was delayed response to his will, apparently, when he

wanted to move his legs, it took him a little longer to move; they moved but it was not a normal voluntary movement. The sensation was gone from his knees down, to pin prick and heat and touch. He apparently did not recognize, except upon very deep pressure, when you were touching his legs below the knees. Above the knees, his sensation began to improve and by the time you got to the hip and waist line, were apparently normal. My conclusions, after going over the case were that this patient had had a traumatism to his spine as well as a dislocated hip; that he had had what would be termed a concussion of the spine in which he had suffered this temporary paralysis of his intestines and probably his bladder and that other than this, these conditions which affected his bladder and those intestines, he apparently had recovered. The shock to the nerves was
207 apparently a temporary one and the function has been restored. The injury to the spine was such that it has left his legs as far as the sensation goes still partially affected. That this loss of sensation is due to a concussion of the spine in which some of the tracts of the spinal cord were damaged such that the sensation has been interfered with. His general health is very good apparently. His digestion I consider to be fair, because he is well-nourished, he is not suffering from emaciation from the lack of nourishment.

Q. No anemia or anything like that?

A. Apparently not, but he is suffering as far as I can tell from interferences with the proper functions of the spinal cord in the way of an anesthesia from his knees down.

Q. Now, the tests that you made of the sensation were such that there could not have been any feigning there?

A. I think not, I think not. I observed him very carefully, and upon striking the places where the sensa-

tion was good, he involuntarily would flinch, while in the places that apparently were anesthetic, or were anesthetic, he made no motion anywhere and apparently was not conscious of me sticking him.

Q. Now, how do you account for the fact, which Dr. Flautt testified about, that there was no muscular disturbance or shrinking atrophy?

A. Well, the atrophy of all muscles is caused by lack of use. If the nerves that control the muscles—if those nerves can make him use his muscles, they won't atrophy; but the nervous tract—sensation could be destroyed and still not affect his nerves.

208 Q. Well, can he move his legs?

A. Yes, he moves them voluntarily, but they respond apparently a little slower to his will.

Q. What I mean is, can he use his legs to stand and walk on?

A. Yes.

Q. Without crutches?

A. No, he supports himself with crutches; the muscles are apparently not strong enough to support him alone.

Q. But you think he can with crutches walk about like he did before?

A. I don't think he ever will walk with the co-ordination of steps like he did before, but I think he can walk with the aid of a crutch or cane.

Q. This condition—

A. (Interrupting.) I think it will improve, they usually do.

Q. If it improves, will the sensation be restored?

A. Likely not; I think in about a year's time, this time, if sensation could have been restored, it would have already been restored.

Q. You think he can learn to make a telegraph line from his spine down to his legs and work them?

A. Well, he will learn to work them by sight, rather than by messages coming from his legs up to the spine and back to his legs.

Q. He will never be able to attend to his work like anybody else?

A. Not manual labor.

Q. You think then it is a permanent injury so far as any manual labor goes?

A. Of the character he has been doing, walk-
209 ing and lifting; ordinary manual labor, I should think so.

Q. Now, did you have him sit up?

A. Yes.

Q. Did he make any complaint of the soreness in his back that Dr. Flautt testified about?

A. Well, he moves rather awkwardly, but the pain was rather a general pain through his back and everywhere else, he didn't mention any pain any particular place.

Q. What would that be due to?

A. I think that is probably due to debility and in bed so long and his age.

Q. He is a man of 64.

A. He looks to be 70 or 75.

Q. Now, you think that appearance of age that you saw on him is due to the injury?

A. I don't think so.

Q. You think he was an elderly man anyway?

A. Well, that is my impression, judging from his looks.

Q. He testified, I don't know whether he told you, I suppose he did because when he was in Court he burst

out with the proposition that he was the strongest man on the wharf, did he tell you that?

A. No.

Q. Had been the strongest man on the wharf, and he is a rather impulsive old gentleman, I could tell the way he testified. Now, just summing the thing up, your view of it is that as far as the disturbance of his liver and his intestines and his bladder, those things are just about what the average man has got anyway,
210 he is not permanently impaired in those respects?

A. Not at all; not seriously impaired at all.

Q. But in his legs, do you think that is a permanent condition of lack of sensation and that he will have to depend for motion upon his legs entirely to the skill acquired by using his eyes to make his legs move?

A. Yes.

Q. He can't just put any sensation down his legs and move automatically any more?

A. Well, he moves automatically, he can use his eyes and move his legs but as far as knowing where he is going to step and things of that kind, he will have to learn that by observing and watching.

The Court:

Either one of you can examine him. Let the libelant examine him first.

Mr. Price:

We have no questions.

Cross Examination.

Questions by Mr. Rayzor:

Q. Doctor, I would just like to ask you one question: Why do you suppose it was that this paralysis did not show up right after the injury?

A. Well, my understanding is that all the paralysis that was observed did occur immediately after the injury, that is, his intestinal paralysis and his bladder paralysis.

Q. I mean, his paralysis in his leg?

A. He hasn't had that, as I understand it, at all.

(By Court):

Q. Hasn't had what?

A. Paralysis of the leg.

211 Q. Oh, you are referring to paralysis, but I don't call it paralysis.

A. Loss of sensation to his leg.

(By Mr. Rayzor):

Q. Why didn't that show up?

A. No one knows whether that was there or not; it was only recognized in March. I judge it was there all the time if it is there now.

Q. Is there anything about this man's physical condition that would lead you believe he is 70 or 75 years of age, outside of his legs?

A. Nothing that I know of, except that was the impression that I had when I first looked at him, until I asked him, I would have guessed his age to be probably 70 years of age.

Q. Is he an unusually strong man or not?

A. I had no way of telling except that he is well nourished and of a build, a rather heavy stocky build that you would expect to be at least an average of strength for his time before he was injured.

(By the Court):

Q. Now, I would like to ask you, Dictor, are you acquainted with either the American Mortality Tables or generally from conducting examinations and observ-

ing men and in the Southwest as to the average expectancy of a normal man of 63 or 64?

A. I don't know the figures on that, Judge. The Life Insurance Companies all have them but I am not familiar with the figures.

Q. From your own experience, you haven't formed any opinion yourself as to the normal expectancy of a man?

A. No, they vary; everyone is a problem of his own; there is so little regularity about it. It would
212 take a great many figures before you would get—

Q. (Interrupting.) Those mortality tables are about as good a thing to form a general average by as you can get?

A. I think so.

DR. W. E. HUDDLESTON, a witness for respondents, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rayzor:

Q. Your name is Dr. W. E. Huddleston?

A. Yes, sir.

Mr. Rayzor:

I assume that counsel will agree that he is qualified as an expert, and all that?

Mr. Price:

Yes.

Q. Dr. Huddleston, you have heard Dr. Singleton testify about what he found on the examination of the libelant, the injured man, K. Buzynski?

A. Yes, sir.

Q. I wish you would just state to the Court what you found with reference to the senseless condition of this man's legs and what you attribute that condition to?

A. If the Judge will permit me, I will just read a little statement that I submitted to Mr. Rayzor. The only examination that I made—I don't recall a lot of the details because I haven't seen the man since last September.

The Court:

You may refresh your memory by looking at it, but you should testify from your own recollection. You can look at the statement and testify to the facts as best
213 you can.

A. To the best of my recollection I went out last September with Dr. Flautt at the request of Mr. Rayzor, just to see Mr. Buzynski and Dr. Flautt gave me a history of the case, which I have here, which is the same as was given Dr. Singleton to the best of my recollection. I found Mr. Buzynski was an elderly man apparently around 65 years old, and it was stated he was a very vindictive disposition, but I found in reality he was in very serious condition apparently on examination, there apparently being a partial paralysis in both legs with considerable muscular atrophy. This condition I stated compared to the statements given me by Dr. Flautt at the time.

(By the Court):

Q. When was it you said you went out?

A. It was in September of last year. He stated that the legs were very large and how much they had shrunken and how much smaller they were from the time they

were first hurt. Of course, my judging of muscular atrophy was purely upon the statement—

Q. (Interrupting.) Who did you say gave you that statement?

A. Dr. Flautt and Buzynski both remarked how much smaller his legs were, how much smaller they were and he was unable to walk at that time without aid of crutches and according to Dr. Flautt, he was apparently suffering with a well marked cystitis or bladder affection and a chronic gastritis. Now, he gave a history at the time of the accident of suffering with a dislocation of the right hip which was followed soon afterwards by an almost complete paralysis of the intestines and some weeks later he developed hemorrhages; about January, following the accident, he developed
214 jaundice, and then about March 1st he began to notice loss of flesh in both legs. This was, according to the history as obtained from the man himself, Buzynski, and about one month later the inflammation of the bladder began. In the brief examination, in looking over Mr. Buzynski at the time with Dr. Flautt, I felt of the opinion, this being an unusual case and unusual claims in the case, that I didn't want to offer any opinions myself in a case like this unless I could go into it more thoroughly. I felt like I would like to have the man under observation where I could see him and see him two or three times a day for some time, where we could make additional X-ray studies of any possibly injury to the spine, or evidence of hemorrhage to the spine, puncturing the spine, if necessary, drawing off some of the fluid and seeing whether or not there might be any blood clots or any evidence of hemorrhages; he might have an old gastric ulcer; there are so many liver and gastric tests that I felt like I would like to do that before I gave any opinion. In view of the fact I wrote

Mr. Rayzor, gave him this summary and told him I wouldn't care to make any opinion whatever in this case, to state any opinion unless I could have the man at the hospital for observation and study for some several days.

(By Mr. Rayzor):

Q. You have heard Dr. Singleton testify to the effect that in his opinion the conditions outside of that found in the legs where the man apparently seems to be unresponsive to any feeling; that is, touch; would only be temporary. Can you form an opinion from your examination as to whether or not Dr. Singleton is correct or whether or not you agree with him in that conclusion?

215 A. My examination, Mr. Rayzor, was not thorough enough at the time that I could offer any opinion from my own examination.

Q. Do you believe that you could form any opinion in this case as to whether or not this senseless condition of this man's leg is due to this injury without getting him under close observation and making several X-rays and necessary tests with reference to that condition?

A. No, I wouldn't make any statement to that effect at all without further study of the case. In fact, I had not seen him since last September; Since my original visit. It was only a few minutes time.

Q. You heard Dr. Singleton testify about the conditions in the man's legs and there would be perhaps some disruption at the spine; do you think that you could determine whether or not there was a disruption at the spine without making a proper X-ray examination of this man?

A. Well, that is theoretically—

Q. (Interrupting). Would you be willing to testify from an examination and his present condition about

him being senseless to pain or there was some disruption in the spinal cord??

A. There is evidently some injury in the nervous tract, yes sir.

Q. Can you testify as to what that injury was without proper X-rays?

A. No, sir, I would not.

Mr. Price:

Thats all, no question.

The Court:

Any other damage evidence?

Mr. Price:

We have some witnesses here, Your Honor,—

210 After Recess. 2 P. M.

J. SCHULKE, a witness for Libelant, was thereupon called and having been duly sworn, testified as follows:

Direct Examination.

Question by Mr. Price:

State your name please?

A. J. Schulke.

Q. What has been your occupation, Mr. Schulke, and what is it now?

A. Working longshore, cotton and longshore work.

Q. Do you know a man named Karl Buzynski?

A. I know of him; not personally.

Q. Not personally acquainted with him?

A. No, sir.

Q. Now, how old a man are you Mr. Schulke?

A. 72.

Q. 72. Will you state whether or not you are still working in cotton longshore?

A. Every day that I can get it, weather permitting.

Q. How much does a longshoreman working in cotton make by the week?

A. $10.50 a day.

Q. Well, I asked you first, by the day?

A. $10.50.

Q. $10.50. How much does that amount to by the month, by the week?

A. Well, it depends upon how many days you work.

Q. Do you have steady employment in that work, or not?

A. No, sir, we haven't.

Now, when a longshoreman is not working
217 in cotton and is engaged in longshore work, how much does he work as a longshoreman?

A. $6.40 if he makes a day, if he makes 8 hours.

Q. Now, I understand then, that there are two classes of longshore work, one is cotton work and what is the character of the other work?

A. Well, lumber and oil, oil cake and meal, at times coal and so forth, and general cargo of all descriptions.

Q. But in the cotton work, that is a higher paid work than the longshore work?

A. Yes, sir.

Q. Now, what would be the average, about the average yearly wages of a man working in cotton and longshore work too?

A. That varies considerably. Some don't look as much after the work as the others. Them thats after it, that take all they can get, from $1500 to $1800 a year.

Q. You mean by that a man who will seek work and accept work when he can find it, will make from $1500 to $1800 a week?

A. A year.

Q. A year?

A. Yes, sir.

Q. Is that combining the longshore work with the cotton work, or just in cotton work alone?

A. Combining.

Q. Combining?

A. Yes, sir.

Q. How long have you been engaged in this work on the wharf?

A. About 50 years.

Q. About 50 years?

218 A. Yes, sir.

Mr. Rayzor:

We have no questions.

(By the Court):

Q. Well, I would like to ask you one or two questions.

A. Yes, sir.

Q. You say you are 73 years old?

A. Since the first day of September, yes sir, I was born in 1853.

Q. Well, doesn't it take a good deal of strength to handle longshore work?

A. Yes, at times.

Q. Or other classes of work where some are light and some are heavy work? Can you get some longshore work that doesn't require as much lifting as others?

A. Yes, sir.

Q. Now, you are a sturdy hardy looking man for your age, what is the ordinary age at which men quit longshore work, you have had 50 years and you shouldn't mind telling about when does a man get too old to do longshore work?

A. No doubt he does, Judge.

Q. Of course, you look to be very strong, sturdy man. Isn't there a time when men are no longer able to work on the longshore, on account of age?

A. Yes, some are not able to work after 60, some 65.

Q. You are one of the men the Bible speaks about, you are going beyond your three score and ten?

A. I hope so.

219 Q. What I am trying to get at, is it light work or doesn't cotton work, doesn't it take a good deal of strength to handle that, or is the work all done by machinery so you don't have to do any lifting?

A. No, sir, it is manual labor, all lifting, cotton, piling that up, four men to a bale, generally, piling them up pretty high.

Q. How long will it be before you have to quit?

A. Well, thank the Lord, I don't have to do much of it; for the last number of years I have been in the carrying gang.

Q. You are really able, as far as actually pulling or lifting, doing the longshore work, as a man of 70 is?

A. I am still doing the longshore work.

Q. I don't mean managing and handling it as foreman, but as to the strength, it does require a man to lift 200 pounds, a man has to be able to lift 200 pounds?

A. I am doing it yet, sir. At least 200, must lift 200 pounds, a sack of flour, and pile it on the truck.

Q. It is according to the individual, if a man lives and keeps his strength, he might live to be 100?

A. Possibly.

Q. You say a man's wages runs from 1500 to 1800 if he wants to work all the time?

A. If he looks for it, yes sir.

MICHAEL DWYER, a witness for Libelant, having been duly sworn, testified as follows:

Direct Examination.

Question by Mr. Price:

Q. Will you state your name, please?

220 A. Michael Dwyer.

Q. What has been your occupation?

A. Longshoreman.

Q. Have you been a foreman or in charge of the employing of longshoremen, Mr. Dwyer?

A. No, sir.

Q. Do you know a man by the name of Karl Buzynski?

A. Yes.

Q. How long have you known him?

A. Oh, I have known him for 18 or 20 years.

Q. You heard the testimony of Mr. Schulke here that there's two classes of work, there's the longshore work and the cotton work?

A. Yes, sir.

Q. State whether or not Buzynski was a man that was active in seeking work and accepted all kinds of work that was offered??

A. Yes, as far as I knew, he was always looking for work and working around at every job he could find.

Q. Now, there's some classes of work—are there any classes of work that some longshoremen don't want to engage in and therefore don't accept employment in certain classes?

A. Yes sir, there is.

Q. What class of work is that?

A. Well, we'll say trimming grain, for instance, there's a great number of them wont trim grain, can't stand it.

(By the Court):

Q. What do you mean by "can't stand it?"

A. The dust, Your Honor, wont allow them to work at it. Then there's sulphur work, a great number of them wont work sulphur.

221 Q. Now, from your knowledge of Buzynski and your experience in the longshore work here, I wish you would state whether or not Buzynski was a man that accepted this undesirable work, such as sulphur or wheat?

A. Yes, I saw him working at both of those classes of work.

Q. You saw him working at both classes?

A. Yes, sir.

Q. So that a man that would accept that sulphur and wheat work, he would be employed more steadily than the man who would not, would he not?

A. Oh yes.

Q. Now, I will ask you, how much does a longshoreman make a day?

A. Well, he makes $6.40 if he works 8 hours.

Q. Well, if he works more than 8 hours, how much does he make?

A. Well, he works by the hour, of course, the more hours you work the more you make.

Q. Do they get straight time for overtime?

A. After 8 hours it is time and a half, yes sir.

Q. And what is the rule with reference to Sunday work?

A. Sunday work is double time.

Q. Now, from your experience, Mr. Dwyer, as a longshoreman, and working in longshore work and your acquaintance with Buzynski and the character of man he was, I will ask you how much his average yearly earnings would amount to?

Mr. Rayzor:

Your Honor, we object to the question, because he has brought him down now to the specific issue of how much this man earned and unless he has positive knowledge of it, we think that this man's opinion or conclusion is highly inadmissable.

222 The Court:

I think the objection is good. I don't think he could, guess how much Buzynski could earn.

Q. How much could a longshoreman earn who sought work steadily and accepted all classes of work offered him?

A. Well, I judge he could earn anywhere's from $1500 to $1800 a year, probably a little more.

Q. You knew Buzynski before he was injured?

A. I did, sir.

Q. Did you see him frequently or not?

A. Yes, I saw him pretty often.

Q. What was his appearance as to whether he was a man who was weak or run down or whether he appeared to be a strong and healthy man?

A. Oh, he appeared to be a strong healthy man as far as I knew; I knew he was strong and husky.

Cross Examination

Questions by Mr. Rayzor:

Q. How long have you known Mr. Buzynski, did you say?

A. Oh, around 18 or 20 years.

Q. Are you a close friend of his?

A. No sir, not any more than he was a member of the same organization.

Q. You belong to the same union?

A. Yes, sir.

Q. Do all longshoremen in Galveston work the year around on ships?

A. The year around?

Q. Yes.

223 A. Yes, sir.

Q. All the men in your union have continuous employment for the 12 months in the year?

A. I don't know what you mean by continuous.

Q. Every man in your employment, does he work daily throughout the year?

A. You mean every day?

Q. Yes.

A. Not every day, no sir.

Q. With the exceptions of Sundays or Holidays.

The Court:

He has already stated he got $1500 or $1800; on that basis he couldn't work every day.

Mr. Rayzor:

I think I have a right to test his credibility as to his conclusion.

The Court:

I think that is mathematics, if you get 80 cents an hour and you work every day, you are bound to get something like $2300 or $2400. I say, he has evidently knocked off for a good many days; he don't claim to work every day. Now go ahead and see how many days they did work.

Q. The men of your union are engaged exclusively in loading and discharging ships, are they not?

A. Yes, sir.

Q. There are seasons of the year when that business is at a low tide here and you don't have a great deal of that work?

A. Thats right.

Q. In fact, for about six months out of the year, you are not regularly employed at all in the shipping buisness?

A. We are not regularly employed at no time in the shipping business; some days we don't work
224 at all.

Q. How many months in your opinion would a longshoreman average in steady work at this port for a year?

A. I don't know. Take myself, for instance, I am working every month pretty well, four or five days every week, maybe more.

Q. Well, are you about the average man, are the rest of them as successful as you in getting employment?

A. A great number of them are, yes sir.

Q. And a great number of them aren't too, is that a fact?

A. Well, there's a great many in different circumstances. Probably they don't have to work every day.

Q. When you say $1500 to $1800 a year as the amount which a longshoreman could earn, are you basing that from your own experience from your own employment and your own earning ability?

A. Yes, sir.

Q. And not with the average man but from your own viewpoint?

A. From my own viewpoint, yes sir.

Q. As a matter of fact, you don't know what other longshoremen make, do you?

A. I've got a pretty good knowledge, yes.

Q. A pretty good knowledge based on your experience?

A. Yes, and basing it on my own because there's numbers of them have to work the same as I do.

Mr. Price:

Now, may it please the court, there was some talk this morning about the mortality table; that is admissible, of course, for guidance for whatever it is worth.

The Court:

Nobody is objecting it it; Rayzor thinks it is the only thing, and you think it is a good thing.
225 What is it?

Mr. Price:

We can have this identified by an actuary who is present in the Court room, unless respondents object to introducing it, to show the probable expectation of Buzynski's life.

The Court:

Nobody is objecting. If you want to make the offer of it. What does the mortality table show?

Mr. Price:

He was 63 when he was injured. It is 12.26 years.

The Court:

What does the actuary say about 65?

Mr. Price:

At the age of 65 it is given at 11:10.

ARTHUR GRIGG, a witness for Respondents, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rayzor:

Q. State your name to the stenographer?

A. Arthur Grigg.

Q. After Mr. Buzynski's injury, the libelant in this case, did you make any payments to Mr. Buzynski on behalf of the Texas Contracting Co.?

A. I did.

Q. Do you recall what the amount was you paid Mr. Buzynski?

A. 36 weeks; $720.00.

Q. You paid that yourself to him?

A. I either delivered the checks in person or someone in my office, with the exception of maybe three or four that were delivered by Dr. Flautt, saying that he was going out to the house that day and would assist me by taking them out there.

226 (By the Court):

Q. What do you mean by 36 weeks?

A. We paid him $20 a week for 36 weeks after the first week that he was injured.

Q. $20 a week; what did you base that on?

A. That's the maximum amount paid according to the law, under the Compensation law.

Q. You paid him under the Compensation law?

A. Yes, sir.

(By Mr. Rayzor):

Q. Those payments were made according to the terms of the compensation law?

A. Yes, sir.

Q. And no complaint was made to you from Buzynski about not receiving any of those checks that you sent out to him?

A. Oh, there was times when I would let two weeks go by and wait and get two checks from the company; they came in from the company weekly, sometimes I would wait two weeks and take him two. He lived so

far in the West end. He was one of the very few cases in my office that I delivered the checks to personally.

Cross Examination.

Questions by Mr. Price:

Q. At $20 a week, how much would a man have to earn to be entitled to that under the compensation law?

A. He would have to earn, I can't say exactly, Judge, but it is somewhere between $5.78 and $6 per day or something like that. I have the total but I haven't it with me, but we have been paying him according to the longshoremen making $6.40 or 80 cents an hour a day.

Q. Or about $40 a week?

227 A. Well, we never figured on that basis. We paid him according to the reports sent in to us by these stevedores, which showed they were getting either $6.40 a day or the average wages were 80 cents an hour. We didn't stop to figure to see how much they get.

Q. And that was on a weekly basis?

A. We paid him according to the weekly basis, gave him the maximum amount only. We didn't investigate to see exactly what his earning capacity was. There was no way for us to do that.

Oral testimony taken in Open Court. Filed March 23, 1926.

228 DEPOSITIONS OF M. STROSK, ET AL.

Filed January 12, 1926.

In the United States District Court for the Southern District of Texas, at Houston.

(Title Omitted.)

Agreement:

Depositions of various witnesses taken on behalf of respondents in the above numbered and entitled cause, said depositions being de bene esse pursuant to United States Revised Statutes, Section 863. It is agreed that time and service of notice is hereby waived; also that all objections to the form of questions are waived unless raised on this hearing, but that all other objections are reserved until the trial of this cause. It is also agreed that the signing of this deposition by the witnesses is also waived. It is also agreed that the cost of the original and two carbon copies of this deposition may be taxed as costs of the case, to abide the determination thereof.

Witness our hands this 21st day of October, 1925.

W. E. PRICE,
Proctors for Libelant,
LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for Respondents.

229 Appearances:

For Libelant: W. E. Price and D. B. McInerney, of Galveston, Texas.

For Respondents: For Wm. Parr & Company, Mr. Mart H. Royston, Galveston, by J. Newton Rayzor. For

The Texas Contracting Company, and Luckenback Steamship Company, Incorporated, Lockhart, Hughes, Lockhart & Rayzor, by Mr. Newton J. Rayzor.

Mr. Rayzor:

For the purpose of the record counsel for respondents request counsel for libelants to indicate now if there will be any amendment filed to the first amended libel. This request is made for the reason that the steamship Edgar F. Luckenback on board of which are several of the respondent's witnesses is now in the Port of Houston and the witnesses are now available, and if libelant, or if counsel for libelant propose to file any amendment, we desire to be advised of it now in order that we may examine our witnesses on all of the matter which they propose to set up in their amended libel.

Mr. Price:

Counsel for the libelant states at this time that upon information and belief further allegation of negligence on the part of the respondents Luckenback Steamship Company will be made in that the winch which caused the injury to the libelant was defective in this, that the operating lever of the said winch was of such a character as to permit same to open the steam valve by falling of its own weight, that there was no means provided to hold the throttle lever in a neutral position when there was no one attending the wench [winch] and that the

230 steam valves of the said winch were defective in that they permitted the escape of steam into the cylinders of the winch when the same were closed. In making these allegations the libelant does not waive its right to rely on the doctrine of res ipso locatur under which counsel for libelant understands it would be the duty of the defendants to show that the winch did not

start as the result of any defects of the same or the manner in which the operating gear was constructed, and that no definite means was provided to hold the operating lever in a neutral position when the winch was not in use.

Depositions of M. Strosk, E. M. Jackson and E. M. McCarthy, witnesses for respondents, Luckenback Steamship Company, Wm. Parr & Company and The Texas Contracting Company, being of lawful age, taken before C. R. Triay, a notary public in and for Harris County, Texas, on board the steamship Edgar F. Luckenback in the Port of Houston, Harris County, Texas, on October 21, 1925, in accordance with the agreement first hereinabove set out. Captain E. M. McCarthy was present during taking of these depositions.

Said Witness M. STROSK, being first duly sworn testified as follows:

Direct Interrogatories.

Questions by Mr. Rayzor:

Q. State your name, please?

A. M. Strosk.

Q. You are chief engineer of the Edgar S. Luckenback?

A. Yes.

Q. You were acting in that capacity in October, 1924?

A. I did.

231 Q. Were you aboard this ship as a chief engineer at the time the libelant, K. Buzynski was injured?

A. I was.

Q. In Galveston in 1924?

A. I was.

Q. How long have you been going to sea?

A. Since 1908.

Q. You have been serving in what capacity?

A. I am a naval officer retired, lieutenant, United States Navy.

Q. What certificate do you ho'd, if any?

A. Chief engineer.

Q. Now what experience have you had since 1908 in going to sea?

A. Well, that would be naval duties, you know, that would be different entirely from this.

Q. That is all right, state all the experience you have had including your naval service and so forth.

A. My duty at that time consisted mostly of engineering.

Q. At what time?

A. Since 1908.

Q. How long have you been acting as chief engineer on this ship?

A. Since June, 1923.

Q. 1923. What positions did you occupy before then?

A. I came with these peop'e as chief engineer.

Q. Are you familiar with the type of winches used on board this ship?

A. I am.

Q. What type of winches are they used aboard this ship?

A. Moore.

232 Q. Is that a reputable manufacture of winches?

A. Yes, indeed.

Q. Is this a type of winch that is in common use by many steamship companies?

A. Yes.

Q. Is the type of winch used on this vessel in your opinion a good winch?

A. Certainly.

Q. It has always performed the services satisfactorily to which it has been put?

A. Yes, sir.

Q. You did not see the libelant at the time that he was injured on October 25, 1924?

A. No, whatever date it was.

Q. Do you know at what hatch the libelant was injured?

A. I was told that he was injured at hatch No. 3.

Q. You were on the ship of course the day before this accident happened while they were discharging cargo and loading cargo?

A. Yes.

Q. Were they using the port winch at No. 3 hatch?

A. Yes.

Q. Did they use it the day before the accident?

A. Yes, sir.

Q. Did anyone report to you the day before the accident that the winch was out of condition?

A. No.

Q. Did you make any repairs on it the day before the accident?

233 A. No.

Q. Was the port winch at No. 3 hatch used immediately after the accident, and the day after the accident?

A. Yes.

Q. Anybody report to you in any way that the winch was out of order?

A. No.

Q. Were any repairs made on the winch?

A. No.

Q. Had any repairs been made on that winch since this accident up to date except such repairs as were incident to the wear and tear?

A. Just wear and tear.

Q. Just such repairs and adjustments as were incident to the wear and tear of the winch by the use?

A. Yes.

Q. How is the steam admitted from the feed line into this winch, the port winch of No. 3 hatch?

A. Well, by actuating a valve.

Q. Where is that valve located?

A. In the center between two cylinders, that is I am talking about the valve that operates the winch, not the stop valve.

Q. You didn't understand my other question. How is the steam admitted from the feed line into the winch, not the control lever, but into the winch, is there a valve there of any kind?

A. There is a valve. There's branches leading from the main steam supply line, there is a stop valve provided.

Q. Does that stop valve you referred to control the steam in coming from the branch line into the
234 winch?

A. Yes, sir.

Q. Now where is that stop valve located?

A. Right along side the winch.

Q. Then as I understand what you have testified, there is a stop valve on the branch steam line and you open that stop valve and the steam is then admitted into the winch?

A. Yes.

Q. Now is there any other valve that is necessary to be operated in order to start the winch to running after the stop valve has been opened?

A. Yes, the operating valve, which is actuated by a lever.

Q. You call that the control lever?

A. Control valve, yes.

Q. Now if that steam valve on the feed pipe, the steam feed pipe into the winch is closed of course you cannot run the winch?

A. No.

Q. The operation of the lever up and down would not affect the winch if the steam valve had not been opened?

A. No.

Q. How far is that steam valve from the control lever?

A. Immediately along side the control lever in this case.

Q. Can you reach over, can a man operating a control lever reach over and reach the steam valve?

A. Yes.

Q. Now what kind of material is that control lever made of on this winch?

A. Ordinary iron lever.

Q. About how long is that lever?

235 A. Well, it is from the fulcrum, there are different lengths you see. This one might be five feet, about five feet.

Q. There is considerable weight on that lever then?

A. Yes.

Q. Being five feet of lever. Are these winches easily operated?

A. What do you mean easily operated?

Q. Easily operated, does it take a man with a great deal of ability to operate that lever?

A. No.

Q. They operate it on the Pacific Coast by different classes of people?

A. Yes, sir.

Q. Does it take much force to raise and lower the control lever?

A. About 15 to 20 pounds.

Q. Now there's some danger is there not, chief, when a man goes off and leaves that lever, if there is any vibration on the ship, that the lever can drop down?

A. It could happen.

Q. Have you ever seen it happen?

A. Yes.

Q. You have seen it drop down?

A. Yes.

Q. If that control valve leading from the steam line is closed when a man leaves a winch it would not matter whether the lever dropped down or not, would it?

A. No.

Q. The winch could not start could it?

A. No.

236 Q. Is it safe for a winchman to go away and leave his winch like you have here, like the port winch at hatch No. 3 on this ship, without closing that valve on the feed line?

A. It would be safer if the valve was closed.

Q. If he goes away and leaves that valve open or the control lever on center, if there is any considerable vibration about the ship, there might be a liklihood of the lever falling and starting away?

A. There may.

Q. Was there anything wrong, were there any defects in the cable that was used before and after the accident in October, 1924?

A. Well, I did not inspect the cable.

Q. Did they continue to use the same cable?

A. To my knowledge they did not change any.

Q. If the cable had been changed on there would you as chief engineer, have known about it?

A. Yes.

Q. And it was not changed?

A. No, not to my knowledge, that is I do know it was not changed.

Q. You do know it was not changed?

A. Yes.

Q. Did they report to you or did you observe any defects in the gear or tackle other than what had been asked about at the time of the accident, or after the accident?

A. No.

Q. Did you see them using the same gear and tackle after the accident?

237 A. To my knowledge nothing was changed.

Q. You saw them operating this port winch after the accident. How was the cable wound on the drum on the port winch, chief, how was it wound then?

A. The same.

Q. The same as it is now?

A. Yes.

Q. How is it wound now?

A. In such a way that if the man presses the lever down the cargo would go down. If they raised the lever up the cargo would be lifted up.

Q. Is that the only way you ever wind the winches on this ship?

A. It is not my duty to do this, but we have them wound that way so as the fall would not cut the gear guards.

Q. And the port winch was wound that way?

A. Yes.

Q. At the time of this accident. Were you aboard about 8 o'clock on the morning of the accident?

A. I was all night aboard and at that time in the morning.

Q. The steam was turned on, the steam is turned on for these winches from the engine room, is it not?

A. Yes.

Q. What time was the steam turned on on the morning of the accident?

A. About an hour before the stevedore started to work.

Q. Do you remember when they struck off work the night before?

A. No, I could not say. I think it was in the evening some time.

238 Q. You don't remember the time but you remember it was in the evening or night. You don't remember whether it was 8 or 9 or 10 o'clock?

A. I could not say.

Q. As a general rule how long is it after they strike off work before the steam is cut off from the feed line?

A. Probably 15 or 20 minutes, something like that; nothing definite.

Q. You didn't see the sling hanging up on the ship the night before this accident happened, did you?

A. No.

Q. You did not see the sling on the morning before it happened?

A. No, no.

Q. You don't know where it was hanging up, high or low?

A. No.

Q. Is there any way you know of under the sun for that sling, for a sling on a cable from the port winch

as it was wound at the time of this accident could be raised up without the lever being lifted?

A. No, it could not.

Q. I believe you said what would happen if the lever were to fall or go down?

A. Yes, sir, it was a statement as to how the fall was wound.

Q. You stated there, I think, that as the lever went down that the fall would come down?

A. Yes.

Q. Do you recall whether or not at the time of this accident that there was any wooden extension on the handle?

A. No.

Q. On the port winch of No. 3 hatch?

239 A. No.

Q. There was not?

A. No.

Q. Do you often come in here with wooden extensions on to the handles of the winches?

A. Well, sometimes we do and again we do not, because that don't have no influence on the operation of the winch.

Q. Who put those wooden extensions on there?

A. The winchmen on the Pacific Coast, as one man operates two winches, the levers are—being too far apart for him to use he makes the extension.

Q. Does one man operate two winches here?

A. No.

Q. In Houston and Galveston?

A. One man.

Q. One man for each winch?

A. One man for each winch.

Q. Does that wooden extension on the lever affect the safety or workability of the winch?

A. Not at all.

Q. Chief, what is the practices, if any, of winchmen coming aboard this ship in the morning before work starts with reference to warming up the winches?

A. The steam is turned—

Mr. Price:

(Interrupting.) We object to the question and the answer as to the practice of winchmen coming aboard the ship.

Mr. Rayzor:

I want to modify the question by adding this: I mean by custom and practice of winchmen, the cus-
240 tom and practice of the winchmen employed by The Texas Contracting Company at Galveston.

Mr. Price:

Same objection.

A. The steam being turned on about an hour before the stevedores come to work.

Q. Go ahead.

A. So as to warm up the line and when a man comes aboard, the steam is on the line ready to use.

Q. Now what do the winchmen of The Texas Contracting Company at Galveston and Houston usually do when they come on board with reference to the winches, do they warm them up or not?

Mr. McInerney:

Same objection.

A. They do. As a rule when the stevedores are getting ready, uncovering hatches, the winchmen warm up the winch by actuating it up and down.

Mr. Price:

We object to the question and answer as to the practice of winchmen in warming up the winch by actuating the lever because such testimony would not be binding on the libelant in this case.

Mr. McInerney:

Objected to as coming from the chief engineer.

Q. You don't know whether the winchman at No. 3 winch on the morning of the accident warmed up his winch or not, do you chief?

A. No.

Q. You didn't hear him, you didn't see him?

A. No.

241 Cross Interrogatories.

Questions by Mr. Price:

Q. Now how old are you chief?

A. 40.

Q. Where were you born?

A. Poland.

Q. Poland?

A. Yes, sir.

Q. Now you say that you are a retired officer of the United States Navy?

A. Yes, sir.

Q. You don't mean by that that you were a regular officer in the Navy, do you?

A. Yes, sir.

Q. Were you a regular officer or a reserve officer?

A. I say regular.

Q. A regular officer?

A. Yes, sir.

Q. By that, you want the Court to understand that you had gone through Anapolis?

A. No.

Q. How did you get to be a regular officer in the Navy?

A. By taking the examination.

Q. You were in the Navy?

A. Yes, sir.

Q. What rank did you hold?

A. Lieutenant.

Q. Why were you retired?

A. For physical disability.

242 Q. How long did you serve in the Navy before you became an officer?

A. About seven years.

Q. Seven years?

A. Yes, sir.

Q. What rank did you have when you went in the Navy?

A. Machinist, second class.

Q. Machinist, second class. When you became an officer, were you a line officer or an engineer officer?

A. A line officer.

Q. Now what do you mean by a line officer?

A. That is pertaining to performing all duties of line officer.

Q. All duties. In the deck department and in the engine department?

A. Yes.

Q. What ship were you on or attached to when you took that examination?

A. The battleship "Virginia".

Q. The battleship "Virginia". Now the winches on this ship were manufactured by a concern named Moore?

A. Yes, sir.

Q. Where are they manufactured?

A. Newark, New Jersey.

Q. Newark, New Jersey.

A. Yes, sir.

Q. Now, how long have you been on this ship altogether?

A. Since June, 1923.

Q. June 1923. And did you ever see any
243 other of these Moore winches besides the ones on this ship?

A. No.

Q. So that you wouldn't know then whether the valves actuating the levers and brackets and fulcrum stands are the same on these winches as it was when it was originally turned out?

A. These are as originally turned out.

Q. They are as originally turned out?

A. Yes.

Q. Now this ship has three winches to each hatch, hasn't?

A. Not all.

Q. It has three winches to the hatch at which this man was injured, didn't it?

A. Yes.

Q. Now which hatches do not have three winches?

A. 2, 3, 4, 5 and 6.

Q. You mean by your answer that there are three winches at 2, 3, 5 and 6?

A. 4, 5 and 6.

Q. 2, 3, 4, 5 and 6?

A. Yes.

Q. So that there is three winches at practically all hatches? Except No. 1 hatch?

A. No. 1 and 8.

Q. And 8?

A. Yes, sir.

Q. They are the hatches at the extreme ends of the vessel?

A. Yes.

Q. No. 1 being forward and No. 8 being
244 aft?

A. Yes.

Q. Now what is the purpose of having three winches at each hatch on this ship if you know?

A. I couldn't say that. I may say that in some ports they were using two gangs on each hold, so they used three winches.

Q. Some ports they use two gangs in each hold?

A. Yes.

Q. Well, loading from the same side of a ship can they use two gangs in each hold?

A. Yes.

Q. Well, what would be the need of another winch there to do that?

A. Well, certain cargo, it is out of my line you may say, but certain cargo they can handle it with one winch and others it is handled by using two winches.

Q. Well, if they use one winch or two winches, they would not be using the three winches on the one side loading or discharging cargo at one side at the same time, would they?

A. Yes.

Q. That would be rather a complicated method of handling cargo, wouldn't it?

A. Not at all.

Q. It would not?

A. No. We are doing this at San Francisco at this time.

Q. Use three winches independent of each other?

A. Not independent of each other, there is two working together and one working independent
245 of the other two.

Q. Then there would be two winches practically working independent of each other, loading or discharging from the same side?

A. No, there's two working together and one independent from the other two.

Q. How does that work?

A. Very good.

Q. In other words the one winch would hold the stuff up to the hatches and then the other would hook on and lower the stuff down with a third winch?

A. Yes, sometimes they use a block and forward line, and having a man to bring the hook back to the hold.

Q. You didn't want the Court to understand they had the two winches working together and one working independent, carrying over the side of the ship?

A. Yes.

Q. At the same time?

A. Yes.

Q. You did?

A. I did.

Q. Now did you turn the steam on in the engineroom that morning?

A. Not I.

Q. Who did turn it on?

A. The oiler.

Q. Did you see him turn it on?

A. I did not see him turn it on but I saw that the steam was on the line.

Q. Did you order him to turn it on?

A. That's his standing orders.

246 Q. What was his name?

A. I could not say.

Q. Is he on the ship now?

A. No.

Q. You did not see him turn it on?

A. No.

Q. Where were you when this accident happened?

A. I could not say. I was aboard I should say probably.

Q. When did you see the steam on, you say you saw the steam on, when did you see the steam on?

A. About 7 o'clock.

Q. About 7 o'clock?

A. Yes, sir.

Q. What did that oiler do besides turn the steam on, did he have any other duties?

A. Oh, whatever he would be told to do. The only reason is is that the oiler is on the watch. The reason that I have an oiler on duty throughout twenty-four hours is to have two men in the engineroom and fireroom for safety sake in case something would happen to the fireman. The other man could take care of things.

Q. Well, did this oiler that turned this steam on, what did he do before he turned the steam on at 7 o'clock?

A. He was standing watch from four to eight.

Q. Then it was his duty to go and turn the steam on at 7 o'clock in the morning?

A. Of, course, for an hour before the stevedore comes aboard. If the stevedores start at seven, we turn the steam at six, if they start at eight we turn the
247 steam at seven or sooner.

Q. So that in this case although you did not see the oiler turn the steam on, you would say he turned it on at 7 o'clock because that was the orders that you had given him?

A. Yes, and I see that the steam is on, that is one of my most important duties in port is to see that the steam is on and everything in working order for the stevedores. And I am very concientious about it and see that it is done.

Q. Well, did he oil the winches before they started that day?

A. When the men started to warm winches, either the oiler or deck engineer starts to oil winches from one end to the other.

Q. What were the names of the oilers that you had on board at that time?

A. Oh, I could not tell you the names.

Q. Are they on the ship now?

A. No.

Q. Neither one of those oilers are on the ship?

A. What do you mean neither one?

Q. Well, you had two oilers on watch at that time you said.

A. One oiler I said and one fireman.

Q. One oiler. And that oiler is not aboard?

A. Not aboard.

Q. Not on board?

A. No.

Q. What was it you said with reference to oiling the winches?

A. When the stevedores started to work, the deck engineer or oiler immediately oiled winches starting from one end to the other, or whatever winch may be working,

248 sometimes they are not working all the winches you know. Often times I may say.

Q. Now you say that none of the gear was overhauled on the ship since the time this accident took place?

A. What do you mean gear, g-e-a-r? You mean the winches?

Q. Winches?

A. Well, we are always overhauling them, that is making adjustments due to wear and tear.

Q. Now was there anything added to those winches at all since this accident happened?

A. No.

Q. You say there was not?

A. No.

Q. You are positive of that?

A. Yes.

Q. When were those lead balls put on that lever?

A. We have been experimenting with them for about a year and a half now.

Q. You have been experimenting with them for a year and a half?

A. Yes.

Q. Well, when were they put on the levers?

Mr. McInerney:

These now.

A. It is over a year now.

Q. Do you want the Court to understand they were on those levers at the time this man was injured?

A. I am hazy about that because when this accident took place there was no special—

(The reporter thereupon read the question to the witness.)

A. I am hazy about it because when that accident took place I was not questioned as to the con-
249 dition of winches or anything else until several months later.

Q. What port were they put on in?

A. Well, we did not put them on in any port, we do most of our work at sea.

Q. Did you put them on yourself or did some machine shop put them on?

A. We done it aboard.

Q. You put them on aboard the ship?

A. Yes.

Q. Under your supervision?

A. Yes.

Q. Why were they put on there?

A. The operating valves, as a rule the winchman would state that the operating valves were working too stiff and it was not free enough for them. For that reason they were hanging weights on it which had no consequence, which did not help them out so they are not necessary, these weights which are put on are really not necessary for the operation of a winch but just for the psychological effect on the winch driver it was put on.

Q. Then they were put on not because they served any purpose at all but just for the psychological effect on the winch driver?

A. Yes, sir.

Q. You say yes?

A. Yes.

Q. They are not a part of the regular equipment of the winch, are they?

A. No.

250 Q. Now do you order anyone to go around and bleed those winches?

A. When?

Q. In the morning before the stevedores start to load or discharge.

A. They always have instructions to open the drains, in their winches, drain valves, so as to get rid of water when the winchmen operate the winch.

Q. The oiler does that?

A. Yes. As winch drivers it is well to do that, whenever they start the winch up after they have been standing still for a certain time.

Q. When the winches stand still for a long time why over night there is considerable water accumulates in the cylinders does it??

A. No, only the time when the steam is turned on by the winchmen the condensation of steam in cylinders takes place and if not gotten rid of may damage the winch.

Q. Well, the steam that is in the chambers, in the cylinders and inside parts, that condenses during the night doesn't it, it makes water in there?

A. It should condense.

Q. How do they get that out before they start?

A. As I say, the drain valves are opened.

Q. Who are they opened by?

A. Either by the oiler or the winch driver.

Q. Well, what forces the water out then?

A. The steam.

Q. The steam. Then in order to get the water out, it is necessary to turn a little steam in there
251 to force that water out, isn't it?

A. No, because the drain comes out at the bottom of cylinders and what it gets over night it will drain out when the drain cock is opened.

Q. That will only drain one part of it won't it?

A. Yes, but there's two drain valves, one on each end.

Q. You are sure there are two drain valves, one on each end, on each cylinder?

A. Yes, sir.

Q. This ship was built in 1916, wasn't it?

A. I think it was '15 or '16.

Q. 1915 or 1916?

A. Yes.

Q. And how long have you been on the ship?

A. Since June 1923.

Q. June 1923. June 1924 would be one year and June 1925 would be two years and this is October, it will be practically two years and four months?

A. Somewhere about that.

Q. That you have been on the ship?

A. Yes, sir.

Q. In that time were those actuating valves taken out and ground or not, the seat ground or not?

A. The actuating valves have no seat.

Q. They have no seat?

A. They are spool valves, or piston valves as you may call them.

Q. The valves itself has no seat to it, there's port?

A. A port.

252 Q. Well, were they ever taken out and anything done with them?

A. They were taken out and inspected, found in good condition and put back again.

Q. What inspection was made of them?

A. By taking dimensions of the sizes of the valves and the port of the cylinder in which the piston valve is riding.

Q. Did you do that or someone else do it?

A. It was done aboard?

Q. Did you do it?

A. I took the dimensions, yes I took the dimensions myself.

Q. On all of the winches?

A. Yes.

Q. When?

A. In the intermediate time.

Q. Well, I would like to have you state when you did do it?

A. Well, I will say that it was before the accident, shortly before the accident.

Q. You found them all right, did you?

A. I did.

Q. And you just looked at them and measured them and found them all right and put them back again?

A. Yes.

Q. That was shortly before this accident?

A. Yes.

Q. That you did that. Have you done it since the accident?

A. Did some of them?

Q. What winches did you do?

A. No. 1 starboard and No. 5 center, done
253 on this trip.

Q. You don't look at all of them at the same time?

A. No.

Q. Well, can you state when you looked at this particular winch, this one that caused the injury to the libelant in this case?

A. I inspected them all either in coming to Galveston or the trip before that.

Q. Is that the closest date that you can give?

A. Yes.

Q. Well, now the valve where you turned the steam on, now if that did not seep properly there would be steam escape through there up into the control chamber, would it not?

A. Yes.

Q. So that even with the lever in a neutral position or with the lever slightly open, that is the throttle lever slightly open and the steam escaping through that intake valve that would cause the winch to start, wouldn't it?

A. It all depends.

Q. Well, just answer that question, yes or no.

A. I can't state yes or no because it is a question that if you are handling cargo how much is it required to open the port to put the winch in motion.

Q. Well, just assume for instance that the winch had been standing still all night and we will say that the intake valve was closed and nobody moving the throttle, the actuating lever, and that winch started to run of its own accord, how could that happen?

A. Only if the actuating valve were leaking, but to my knowledge we had no trouble in that respect.

Q. Well, then you said awhile ago that you
254 know of no way in which that winch could run of its own accord, that was not correct then?

A. Did I make such a statement?

Q. That is for you, you ought to know, you testified.

Mr. Rayzor:

Now, just a moment, if the witness wants his deposition read back to him, I am going to ask counsel here to have the question read back.

Mr. Price:

Well, whatever he said or didn't say is already in the record and if he didn't say it there will be no relevancy to that part of it.

Mr. Rayzor:

You can answer whether or not you said it, to the best of your recollection you made no such reply.

A. Well, I would say that as long as the valves are closed I don't know of any way that the winch could start.

Q. Unless the valves are closed and in good condition?

A. Yes, and these valves are in good condition.

Q. Well, of course we are not inquiring about that right now.

A. That's my statement.

Q. But if they were not in good condition, just assuming that they were not in good condition, it could start, couldn't it?

A. Yes, it could. But it is not such a case here.

Q. Now the lever you say is about five feet long?

A. This one I will say—they are different lengths, the winches. Then again, whether you take from the fulcrum or from the valve itself.

Q. Well, say from the fulcrum.

A. Well, I say they are different lengths, I could not commit myself. I say about five feet, but
255 whether I am right or not,—it is about five feet.

Q. And this ball that is on there, in lifting the lever up, it would assist the stevedore or winchman in lifting it up, would it not? That is it would not be so heavy, so hard to lift up would it, with that lead ball on the end of the lever?

A. That in itself is the principle of fulcrum.

Q. Just answer that question, whether it would be easier for that to lift up or not?

A. This is a plain principle of fulcrum.

Q. And when he went to push the lever down, when he was required to push the lever down that weight on the end would make it harder for him to push it down, would it not?

A. That's the same principle of fulcrum.

Q. Well, you see we want to have this in the record, you know we know these things ourselves, but we want it in the record.

A. That's all right.

Q. And when the lever is in the neutral position, it would have a tendency to counter balance that long leverage from the fulcrum out to the end of the lever, would it not?

A. It is true, but when the steam is on the winch, the action of the steam back of piston rings forces the ring against cylinder wall in which the piston is operated and causes friction from 15 to 20 pounds, so that it requires that much force on that lever to move the valves either up or down, actually measured.

Q. Now how much force did it take on the end of that lever to open the valve before that lead ball was put on there?

A. On some of them it will take, it will take a different amount of force.

256 Q. Now isn't it a fact that this winch is a very easily running winch, that is very easy to operate?

A. They are all the same.

Q. It is a very quick acting winch, is it not?

A. This design of winches is designed for quick action.

Q. So then an hour before the stevedores start to work that steam was turned on, then you say?

A. Yes, sir.

Q. Now you have nothing to do with the cables on those winches, do you?

A. No.

Q. You don't put them on?

A. No.

Q. You don't take them off?

A. No.

Q. As a matter of fact the engineers department do not pay much attention to them at all, do they?

A. The engineers department has nothing to do with the falls.

Q. Has nothing to do with the falls. When it was changed, who does the changing of them?

A. The mate.

Q. The mate of the ship?

A. At least he supervises the change.

Q. He supervises the work and the boatswain and the seamen under him actually perform the labor?

A. Well, the stevedore does that in port when they are changing, his supervision.

Q. That is if the stevedores are working the
257 winches and the necessity arises for any cables to be put on the winch, why they put it on?

A. Yes, sometimes they want to change the winch for their convenience, they are working on them and they would rather have that man drive that winch over there or the boom swing, or something like that so they change it in port.

Q. That lever can fall down as the result of vibration of the winch?

A. It is possible.

Q. How soon after this man was injured did you know about it?

A. Well, that morning, the deck engineer told me the man was hurt. It was probably half an hour after this occurred.

Q. Half an hour afterwards?

A. Yes.

Q. Now did I ask you before what year you joined the Navy in first?

A. Yes.

Q. When you first entered the Navy what year was that?

A. 1908.

Q. Now if that fulcrum or if the lever had a hole bored through it and a hole bored through that stand

out there and a pin was inserted through both of them and that lever, the winch could not possibly be started without taking that pin out, could it?

A. It could not, but this winch has a position for neutral position.

Q. You say it has a provision for neutral position?

A. I say yes.

Q. Well, then, how could it fall down then by
258 the vibration of the ship?

A. Well, a winchman operating the winch for their convenience of position, they bend the lever away from this provision that will keep the lever in neutral position.

Q. Well, if there was a spring in there on the inside in between that stand, that is between the stand and the lever itself, it would be necessary to overcome the pressure of that spring in order to move the lever up and down, wouldn't it?

A. That's true.

Q. And there is no means in there at all to hold it in the neutral position, is there?

A. As I say provision is made for that by the construction in the guides in which the lever rides.

Q. Now isn't it a fact that guide is much wider than the width of the lever?

A. That's true, but there's two lugs secured to that guide to keep the lever in neutral position.

Q. Now, isn't it a fact, chief that the only purpose of that lug you speak of in there is to indicate to the winchman when his lever is at the neutral point, isn't that a fact?

A. No, because the lugs would keep the lever in that position if the lever were not bent away from them.

Q. If the lever were not bent away from them?

A. Yes, sir.

Q. Well, then if it was a correctly designed piece of machinery, to hold it in place and your belt bent the levers away, then you could not operate them, could you?

A. In this case you could.

259 Q. Why?

A. Because the lever would have to be swung away from these lugs to be lifted up or down clear of the lugs, you see.

Q. As a matter of fact there are levers on this ship that are sprung away from the lugs?

A. Well, they are sprung by the men themselves who operate the winches.

Q. And you knew that all the time,, didn't you?

A. I know that they are doing that right along but I have no control over them.

Q. Well, did you fix them up every time that you saw that that was done, did you complain to anybody about it being done?

A. No, I made no complaint.

Q. Did you complain to the stevedore of his men doing that?

A. No, because they take their own responsibility for it in case such conditions happen.

Q. What else do you know about this that you have not told? Anything else?

A. Nothing at all. Nothing I can say. If you ask me anything, I will tell you what you want to know.

Q. Who did you make a statement to first about this matter?

A. I don't know the name. Some representative of the insurance—I presume, was questioning me.

Q. Where?

A. First in Galveston.

Q. Did you make a written statement at that time or sign any written statement at that time?

A. I made a verbal statement. Of course, I
260 don't remember that I signed anything. At San Pedro too, but I don't remember.

Q. You don't remember whether you signed it or not?

A. No, sir.

Questions by Mr. Rayzor:

Q. You did not sign it in Galveston or San Pedro?

A. No.

Questions by Mr. Price:

Q. Your statement was not taken down in writing at all at that time?

Mr. McInerney:

No, not the other man.

A. No, I made some notations, but not the regular statement.

Q. Was that aboard the ship?

A. Yes.

Q. Isn't it a fact, chief, that complaint was made the night before the accident about the way these winches were working?

A. No.

Q. Did a trip before that, or some other trip, in handling some cargo out of the hold, the truck, by that I mean the wheels that went under the railroad car, weren't they dropped over the side of the ship into the bay?

Mr. Rayzor:

I want to insert the objection there for the reason that what transpired on the trip before has no bearing or relevancy here.

(The reporter thereupon read the question.)

A. I heard about that but that was due to preventer or some—it was not to the winches fault. That will be the clearest and the shortest answer.

Q. Are the end blocks on the end of the
261 booms here the same ones that were on at the time that the accident happened?

A. I could not say that, that is not my duty.

Q. Well, for the purpose of the record I wish you would look at the end of the boom, you can see them through the port hole here and tell me whether they are a single shift or double shift block?

A. This is a single shift.

Q. They are all single shift?

A. I haven't seen them all.

Q. All that you can see out through the port hole here forward are, aren't they?

A. Yes, as far as I can see they are single. I seen this morning though, a double shift block.

Re-Direct Interrogatories.

Questions by Mr. Rayzor:

Q. Chief, counsel has asked you something about the oiler turning on the steam. I understand by that you mean that the oiler turned the steam on from the engine room?

A. Yes.

Q. In the engine room?

A. Yes.

Q. You didn't intend to convey the idea that he came up here and turned the steam on the winch?

A. No.

Q. He had nothing to do with the valves, turning the steam into the winch that you referred to?

A. No.

Q. Now does that lead ball that counsel has asked you about, which is placed on one end of the
262 lever on the winch, does that affect the safety of the operation of the winch, or is it of much effect at all?

A. No, as I stated before, it is merely for the psychological effect.

Q. Can you get along about as well without it?

A. Yes, indeed, but almost every port the different winchmen have different ideas how freely the winch should be operated and they are hanging different weights and so forth and it makes the winch appear like a farmer's wagon.

Q. Did you have any trouble on the day before this accident or any days previous to that with the steam valve, that controls the steam from the feed line into the winch, the port winch on No. 3 hatch?

A. No, I had no trouble.

Q. Was it affecting them?

A. No.

Q. Have you had any trouble with it since?

A. No, there was nothing done to it.

Q. Does it leak steam when it is closed?

A. No, not to my knowledge; otherwise the winch would not run.

Q. Did it cause you any trouble any time before the accident?

A. No.

Q. Has it caused you any trouble since?

A. No.

Q. If the steam valve were leaking, if that valve were leaking, had been leaking, for all this time, do you think you would have observed it or not in making your inspection?

A. I certainly would.

263 Re-Cross Interrogatories.

Questions by Mr. Price:

Q. Now chief, with reference to these stevedores putting weights on that lever, which end did they put it on, the end that this lead ball is on?

A. Yes.

Q. Or on the other end of it?

A. Yes, directly over the valve.

Q. Directly over the valve?

A. Yes.

Q. What was the reason for doing that, did they ever give you any reason?

A. As I say at every port different winchmen have a different idea about how freely the winchs should operate and I would purposely put a weight on it and asked the winchman how he liked it with the weight. He told me it was very good. The mate was in the presence of that conversation. The winchman was very much pleased with the operation of that winch. We went to another port and another winchman, another winch driver put more weights. It didn't suit him. So it is just a question of difference of opinions.

Q. Well, did they say it operated too freely or too hard?

A. Well, some will say, some like to have it a little bit stiffer, others too hard.

Q. When did that happen, at what port, what date?

A. Well, I made no notations of the date.

Q. When did you do this, what date and what port?

A. It is about over a year ago.

264 Q. I don't care about the port. Just the time. It wasn't the date of this accident or on that trip?

A. No.

265 E. M. JACKSON, being first duly sworn, testified as follows:

Direct Interrogatories.

Questions by Mr. Rayzor:

Q. State your name?

A. E. M. Jackson.

Q. You are now employed on board the "Edgar S. Luckenback"?

A. Yes, sir.

Q. Were you on the "Edgar S. Luckenbach" in 1924, October?

A. Yes, sir.

Q. What position did you occupy in October, 1924?

A. Deck engineer.

Q. What position do you now occupy?

A. The same.

Q. Do you hold any license?

A. License?

Q. Yes.

A. No, sir.

Q. How long have you been going to sea?

A. Since the 3rd of August, 1924.

Q. You first started to sea then?

A. Yes.

Q. The 3rd of August, 1924. Do you remember about October 24th, or 25th, 1924, while you were in Galveston that a man was injured?

A. Yes, sir.

Q. Injured by a chain swing falling on him?

A. Something like that, yes, sir.

Q. Did your duties, you said you were deck engineer, was it a part of your duty to observe the operation of the various winches on the ship?

266 A. Yes.

Q. Had you come on duty at 8 o'oclock on October 25, 1924, or not?

A. I came on duty at 8.

Q. At 8 o'clock?

A. Yes.

Q. Did this injury occur after you came on duty or just before?

A. Well, it was about the time.

Q. About the time. Had anyone made any complaint to you the day before the injury about any defective condition in the port winch of hatch No. 3?

A. No, sir.

Q. Was the winch in a defective condition?

A. No.

Q. Did you see the winch operating the day before the accident?

A. I did.

Q. Was it in good condition?

A. Yes.

Q. Did anybody make any complaint to you the day before the injury about any defects in any of the tackle being used?

A. No.

Q. They used the tackle right after the injury that was used before the injury?

A. So far as I know.

Q. Did you make any substantial repairs on that winch right after the injury?

A. No.

Q. Have you made any since then except for
267 ordinary wear and tear and adjustments?

A. No.

Q. Was the cable wound on the drum of the winch at the time that the accident happened like it is now?

A. Yes.

Q. If you lower the lever to the port winch on No. 3 hatch now which way will the winch move?

A. If you lower it, it goes down.

Q. The sling goes the way the lever goes?

A. Yes.

Q. That's the way it was at the time of the accident?

A. Yes.

Q. Did anybody make any complaint to you at the time of the accident or before that about the steam valve which controls the steam from the feed line to the winch being in a defective condition?

A. No.

Q. Was it in a defective condition?

A. No.

Q. Has it been in a defective condition ever since?

A. No.

Q. They made no complaint about it leaking steam into the winch when the valve was closed?

A. No.

Q. And if that steam valve had been defective and was defective now, do you think you would have observed it in your duties as deck engineer?

A. I surely would.

268 Q. You did not see the accident, did you?

A. No, I did not see the accident.

Cross Interrogatories.

Questions by Mr. Price:

Q. You say you did not see the accident?

A. No, I was not standing by at the time.

Q. Now you say you came on board the ship the 3rd of August?

A. Yes.

Q. In what port?

A. Mobile.
Q. In Mobile?
A. Yes.
Q. And from there where did the ship go?
A. To New Orleans.
Q. From there where did she go?
A. 'Frisco, Seattle and returned to Galveston.
Q. That was August 1924, you joined the ship?
A. Yes.
Q. What were your duties with respect to the winch at that time?
A. Well, to observe the defects, to observe the outlets or the defects on them as the upkeep and repair.
Q. Did you ever take any of the gear down to look at it?
A. Well, I very often do.
Q. What do you do, take it apart to look at them?
A. Well, whatever part is defective or appears to be defective.
Q. State what winches and what you took down, winches you took down to look at?

269 A. Well I have been into all of them during the time I have been here.

Q. What part of the winch did you look at?
A. Well, I have seen into all parts of them.
Q. Well, can you state or name the parts?
A. Well, they have been into the cylinders, they have been into the eccentric valves, they have been into the main bearing and every working part of the winch.
Q. Every working part of the winch, is that all that you looked into?
A. Well, I don't recall the parts as they have them.
Q. At the time of this accident you had only been on the ship a short time had you?
A. Well, from the 3rd of August until the time it happened.

Q. From the 3rd of August 1924, and when did the accident happen?

A. It was in October.

Q. October of what year?

A. 1924.

Q. October 1924. And you say after you joined the ship, it was where—in Mobile?

A. Yes?

Q. And you went from Mobile to New Orleans?

A. New Orleans and from there to 'Frisco and all the points on the west coast.

Q. Well, then how could you have been on the ship when it was in Galveston in October 1924?

A. It was later, on the return trip.

Q. It was on the return trip?

A. Yes.

270 Q. So that was when you first went to sea in August of 1924?

A. Yes.

Q. Up to that time you had no experience on board ships at all?

A. None on ships.

Q. What class of work were you doing before that?

A. Working in machine shops, electrical shops.

Q. What kind of work in the machine shop and in the electrical shops?

A. Armature winding, setting motors in the machine shop and bench mechanic.

Q. You were what?

A. Bench mechanic.

Q. Did you have anything to do with winches before that time?

A. No.

Q. Now the day the accident happened did you do anything to the winch before the accident took place?

A. No, no repair work, no mechanical work.
Q. Did you do anything at all to them?
A. Nothing more than oil them.
Q. When did you oil them?
A. Well, I oiled them at 8 o'clock.
Q. Before the accident or after the accident?
A. I don't remember now whether it was before the accident or after.
Q. Did you open any drain cocks?
A. No, sir.
Q. Well, isn't that a part of the deck engineer's duty, to get the water out of the winches?
271 A. No, sir.
Q. You have never done that?
A. No.
Q. Were you on here when those lead balls were put on those levers?
A. Yes, sir.
Q. Where were they put on?
A. Those were put on in September in the Columbia River at Portland.
Q. The Columbia River in Portland, who put them on?
A. I did.
Q. You did yourself, where did you get the lead?
A. Well, it came aboard in Frisco.
Q. It came aboard in 'Frisco?
A. Yes, sir.
Q. What did you put them on for?
A. Well, I don't know. That was the chief's orders I don't know why they were put on.
Q. Well, what can be the purpose of them?
A. Well, I can't say, the purpose?
Q. You don't know the purpose of them?
A. No, I don't know the purpose.

Q. Who drilled the holes in the levers?
A. I.
Q. What did you drill them with?
A. An electric drill.
Q. While they were on the winch?
A. Yes, sir.
272 Q. While they were right on the winch?
A. Yes.
Q. Anybody help you?
A. Well, I had a helper, yes.
Q. Who helped you?
A. He was a wiper at the time, gave me a hand in doing the work. I don't recall his name.
Q. He was wiper on the ship?
A. Yes.
Q. What did you do with the winch after the accident?
A. There was no work done to it after the accident.
Q. Nothing done to it at all?
A. Nothing done to it.
Q. Now what day did you say these lead balls were put on the winch?
A. Well, I don't know the date, but it was in September, while we were in Portland or at Portland.
Q. How do you know it was in September?
A. Well, because it was that month that we were there.
Q. Oh, that was the month that you were there—that is why you know it was in September?
A. Yes.
Q. What year was that?
A. 1924.
Q. You don't know the name of the man who helped you?
A. No, I don't know his name.

Q. What kind of a looking fellow was he?

A. Well, I don't recall his looks either, so many coming and going.

273 Q. You can't recall his looks?

A. No, I can't.

Q. You don't know his name?

A. I don't know his name.

Q. Where did you get the bolts to put in it?

A. Those came in the supplies.

Q. From where?

A. Well, the point they get all their supplies from is in 'Frisco, I don't know, I suppose they came there because that's where the supplies come aboard at.

Q. Now are you related to anyone engaged in the operation of this ship?

A. No, sir.

Q. Are you related to anyone connected with the Luckenback organization ashore?

A. No, sir.

Q. Now before you worked on this ship where did you work before that?

A. In Atlanta.

Q. In Atlanta?

A. Georgia.

Q. Who did you work for there?

A. Well, I worked for Westinghouse Electric Manufacturing Company, I worked for Bailey-Burrus Machine works, The Atlanta Foundry & Machine Works.

Q. Were you born in Atlanta?

A. No.

274 Q. Where were you born?

A. 25 miles east of Atlanta.

Q. What is the name of the place?

A. Lawrenceville, Georgia, Route 4.

Q. Who else is on the ship now that was on it when this accident took place?

A. Well, there's the first assistant, the chief and the captain. I think that was all.

Q. So you are not able to say whether you oiled the winch before or after the accident?

A. No, I don't know whether it was before or after.

Q. Do you know when the steam was turned on the winches?

A. Well, I don't know the hour exactly but it was supposed to have been 7 o'clock.

Q. Steam was turned on the winches then before the stevedores started to work?

A. Well, they find out the hour that they are going to work and then it is put on an hour before they begin work.

Q. How do you come to know when the steam is turned on?

A. Well, I don't know right to the hour when the steam is turned on. I know when it is to be turned on.

Q. Well, why did you say 7 o'clock then?

A. I said that was the time it was to be put on.

Q. Who told you that was the time it was to be put on?

A. Well, that is what I found out at every place I go to, what time they are going to work, and I know that it is put on an hour before hand.

Q. The steam is turned on an hour before
275 they commence to run the winches?

A. Yes, sir.

Q. Who told you it was turned on at 7 o'clock?

A. Well, I don't know that I was told.

Q. Well, you didn't turn it on yourself, did you?

A. No, I didn't turn it on myself.

Q. How then do you know that it was turned on at 7 o'clock?

A. Well, I was up at that hour and I can tell when it is going on.

Q. Tell when it is going on?

A. Well, very easily, very easy to tell how it is going on. You can tell when steam is entering a line.

Q. Well, how do you tell?

A. Well, you can tell by the sound of the lines; the sound of your steam line. Without steam there is no sound and with steam there is a sound to the line.

Q. What time were the meals served aboard the ship in port, breakfast?

A. 7:30.

Q. You don't do any work at night, you don't stand any watches at night?

A. No, I don't stand any watches at night.

Q. Your meals are served at 7:30 in the morning?

A. Yes, sir.

Q. And you had breakfast that morning, didn't you?

A. Yes.

Q. How long would it take you to eat breakfast?

A. Well, something like 20 or 30 minutes.

276 Q. Well, what would you do before breakfast, you didn't do any work before that time did you?

A. Well, hang around on deck.

Q. Just hang around on deck. Does anybody call you in the morning in port?

A. Yes, we are generally called.

Q. Who does that caling?

A. The oiler.

Q. What time does he call you?

A. Well the time of the call is 7:20.

Q. 7:20?

A. Yes.

Q. Then from the time you are called, then you wash up and by the time you are washed up then it is time for breakfast, isn't it?

A. Yes.

Q. And it takes you 20 or 30 minutes to eat your breakfast?

A. Yes.

Q. And then you start in to work at 8 o'clock. So that you say then that the steam was turned on because you could hear it entering a line somewhere?

A. Yes, the steam line.

Q. Where were you standing when you heard the steam entering the line?

A. Well, I don't know the spot, around on deck.

Q. Well, out on the forward deck or where are your quarters located?

A. Well, the quarters are amidship on the
277 port side, on the aft end.

Q. On the aft end of the amidship housing?

A. Yes.

Q. And while standing there you knew that the steam was turned on at 7 o'clock because you could hear it?

A. I was not standing there that I know of, I probably was and probably wasn't.

Q. Do you mean to say that you can recall at this time that you heard the steam coming into the steam line at 7 o'clock in the morning on the day of this accident?

A. Well, I can hear it every morning.

Q. You could not tell which line it was going in though could you?

A. Yes. Yes, I could tell which line it was going in.

Q. That is rather extravagant practice, isn't it to turn steam on the deck an hour before it is needed?

A. No.

Q. It does not cause a waste of steam?

A. No, no waste of steam at all.

Q. Did you see this man when the ambulance took him away?

A. I only seen them put him in the ambulance.

Q. You saw them put him in the ambulance?

A. Yes.

Q. So you don't know where he was injured at all do you? You don't know where he was when he was injured?

A. Well, he was down in the hold when he was injured. I seen them bring him out of the hold and carry him into the ambulance.

Q. He was down in the hold?

278 A. Yes.

Q. You are positive of that?

A. Yes.

Q. What hold was that in?

A. It was in No. 3.

Q. No. 3. How did he get down in the hold?

A. Well, I take it for granted that he went down the ladder.

Q. How?

A. I take it for granted that he went down the ladder; I didn't see him go down.

Q. He went down the ladder into the hold?

A. That is, I suppose so, I didn't see him go down, the ladder is the way that they have of getting into the hold.

Q. And you saw them bringing him up out of the hold?

A. Yes.

Q. You are positive of that?

A. Yes.

Q. Now, didn't you open those drain cocks on that winch that morning?

A. No.

Q. You didn't turn to, you weren't due to turn to work until 8 o'clock?

A. No.

Q. Were all the hatches off, were all the hatch covers off, off of the hatches at that time?

A. Well, I don't know whether both ends of the hatch covers were off or not. There was a section of them off.

Q. What do you mean by a section?

279 A. Well, the hatches are in three section, the hatch covers are in three sections.

Q. And what would the dimensions of that section be?

A. Well, there's two different dimensions of the section, two different lengths.

Q. Well, the section that you saw was off the hatch, what would the dimensions of that be, how long and how wide?

A. It was the width of the hatch and approximately 10 feet.

Q. 10 feet?

A. Yes.

Q. Did you take the intake valve out to look at it while you have been on the ship?

A. On this winch that you are talking of?

Q. Yes.

A. No.

Q. You don't know whether it was in good condition or not, then do you?

A. Yes, I know. Its working condition had been satisfactory and it has not been removed.

Q. Well, how could you tell whether the valve was in good working condition or not without taking it out and having a look at it?

A. Well, it works satisfactorily.

Q. It works satisfactorily?

A. Yes.

Q. Now did you make a statement to anyone after the accident?

A. I think I did.

Q. Who did you make that statement to?

A. Well, a representative of some firm, I
280 don't know. I mean he was an attorney. I don't know him.

Q. Where?

A. At Galveston.

Q. At Galveston?

A. Yes.

Q. That was right after the accident occurred?

A. No, that was a couple or three months later, probably more; at least one trip later. I don't know if it was later than that or not, but we were not on this trip at the time that it happened.

Q. Did you make a written statement, that is did you sign a statement?

A. No.

Q. Sign your name to a statement. You didn't do that?

A. No.

Q. Where was your statement taken, on the ship?

A. Yes, on the ship.

Q. What did you state to them at that time?

A. Well, just the condition of the winch.

Q. Was your attention at that time called to these lead balls on these levers?

A. Yes.

Q. Who called your attention to it?

A. This questioning attorney.

Q. The attorney called your attention to it?

A. Yes.

Q. Is that the first time that you had noticed it?

A. First time he had noticed it or I?

Q. You, the first time that you noticed it?
281 A. Noticed it?

Q. The lead balls?

A. No.

Q. You don't know the purpose of them either, do you?

A. No.

Q. Now have you talked with anyone on the west coast about this case?

A. No, sir.

Q. Didn't talk to anyone out there about it at all?

A. No.

Q. I believe you stated you were born about 25 miles from Jacksonville?

A. Atlanta.

Q. From Atlanta, and that is where your folks live, is it?

A. Yes.

Re-Direct Interrogatories.

Questions by Mr. Rayzor:

Q. When you put those lead balls on that lever, on the winch, did you do that under the supervision of the chief engineer?

A. Yes.

Q. Was he around there some of the time when you were putting them on?

A. Yes.

Q. Now you stated awhile ago that the oiler usually calls you at 7. Do you mean by that that you always sleep until 7:20? That you actually sleep until 7:20?

A. Well, sometimes I do and sometimes I don't.

Q. Well, you are in your room in your quar-
282 ters in bed, can you still tell when the steam is turned on or not?

A. Yes.

Q. Did you intend or not to convey the idea awhile ago that you were on deck on the morning this happened when you heard the steam, or did you intend merely to say that you heard the steam at 7 o'clock?

A. Well, I don't know the place that I was at at the time, if I was on deck I probably was around the room.

Q. Sometimes do you get up before 7:20 and go on deck?

A. Yes, sometime I do. Very often I do.

Q. Now, did you ever see this man that was injured at the time he was injured?

A. That he was injured?

Q. Did you see him at the time he was injured?

A. No, not at the time, after the time.

Q. You don't know where he was standing at the time he was injured?

A. Not the spot, no.

Q. You didn't see him at the time he was injured?

A. No.

Q. You didn't see where he was working at the time he was injured?

A. No, I didn't see him.

Q. You don't know whether he was on deck or in the hold?

A. He was in the hold.

Q. Are you sure of that?

A. Yes.

Q. Did you see him in the hold where he was working down there before he was injured?

A. I didn't see him before he was.

283 Q. What makes you think he was in the hold?

A. Because they had done gone into the hold to remove the other covers in the lower section.

Q. Some of the men had gone into the hold. Is that the time when you appeared on the scene and saw him when some of them had gone into the hold?

A. Well, I came up a bit later and he had gone in just before they had brought him up.

Q. Now you went on you say at 8 o'clock?

A. I did at 8 o'clock.

Q. Now when you came on they had some of the hatch covers off?

A. Yes.

Q. And some of the men were in the hold?

A. Yes.

Q. Right between decks?

A. Yes.

Q. That was at 8 o'clock?

A. A bit after 8.

Q. A bit after 8?

A. Yes.

Q. Do you know how much after 8?

A. No, 10, 15, or 20 minutes later, before I appeared.

Q. You don't know where the injured man was at 10 minutes to 8, do you?

A. No.

Q. You don't know whether he was on deck or in the hold?

A. No, not at 10 minutes to 8.

Q. Now did you intend awhile ago to say
284 that at the time that this man was injured that he was in the hold or not?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. You said you didn't see him down there until you are sure he was in the hold?

A. I seen him as they brought him out of the hold.

Q. And that is what—it is on that information is it that you base your answer that he was in the hold when he was injured?

A. He was in the hold at the time I seen him.

285 E. M. McCARTHY, being first duly sworn, testified as follows:

Direct Interrogatories.

Questions by Mr. Rayzor:

Q. What is your name?

A. E. M. McCarthy.

Q. You are Master of the 'Edgar S. Luckenback'?

A. Yes, sir.

Q. What licenses do you hold captain?

A. I hold a master's license.

Q. For all seas?

A. For all seas. I also have a British license, Master's license, too.

Q. Have long have you been going to sea, captain?

A. I have been going to sea about 35 years.

Q. You were master of the "Edgar S. Luckenback" in October, 1924?

A. Yes, sir.

Q. You were master at the time the libelant in this case was injured at Galveston?

A. Yes, sir.

Q. You did not see the man when he was injured?

A. No, sir.

Q. Did you see him after he was injured?

A. No, I don't remember seeing him.

Q. You did not see him at all?

A. I don't remember seeing him at all.

Q. Did you see the port winch and the other winches on the ship and especially the winches on the No. 3 hatch operating the day before this man was injured?

A. Yes, sir.

286 Q. They were loading cargo, iron trucks, car trucks?

A. I think we were taking in those car trucks.

Q. Had the winches at Hatch No. 3 been performing the day before the injury without any trouble?

A. Doing very satisfactory work.

Q. After the man was injured, did they continue to use winches at No. 3 hatch without trouble?

A. The same winches, yes.

Q. Was any report made to you from the stevedore or longshoremen or any members of this crew that there were any defects of any winches at No. 3 hatch either at the time of the accident, before the accident or after the accident?

A. No.

Q. Do you generally know when repairs are made to winches on this ship?

A. Well, yes, I see the work going on on the ship. I am around the ship all the time.

Q. Have you heard of or seen any repairs being made to the No. 3 port winches before the accident or since the accident except those that were incident to wear and tear on the winches?

A. No.

Q. Was the winch at No. 3 hatch, was the cable on the port winch at No. 3 hatch wound at the time of injury like it is now so when you lower the lever the winch goes down?

A. Yes, the way the winch is constructed, we can't put it on any other way.

Q. Why?

A. It would strip all the guard gear off.

287 Q. Have the winches always been wound this way on this vessel?

A. Since I have been here, yes.

Q. How long have you been on the ship?

A. Since February 10, 1923.

Q. Have those winches proven satisfactory for you on this vessel in loading and discharging cargo?

A. Very satisfactory.

Q. Do you consider it an efficient winch?

A. Yes, I think it is a very good winch.

Q. You would call it a standard type of winch would you, or not?

A. What do you mean by standard type?

Q. One that is in use, the kind that can be used.

A. Yes, sure.

Q. You are not in as good position to testify about the mechanism as the chief engineer are you?

A. No, sir.

Cross Interrogatories.

Questions by Mr. Price:

Q. As a matter of fact captain, you have very little to do with the winches don't you?

A. Well I'm supposed to see, supervise the operation, if there was anything wrong with them and we could not discharge the cargo it would be up to me to see what was the cause of it, if there was something wrong at that time.

Q. Yes, but you have three mates and the engineers and a deck engineer to look after those things?

A. Yes.

Q. To look after those winches?

288 A. Yes, sir.

Q. And the only time anything wrong about the winches would come to your notice would be when there was something radically wrong, something that prevented the discharge of the cargo, wouldn't it?

A. Yes, if there was anything wrong, if the winches were not working efficiently or any little thing like that, that the cargo could not be handled good, quickly and efficiently, I would know it at once, because the stevedore would come to me with a howl, the broken winches, if they were not working satisfactorily why he would make a howl right quick.

Q. That is you would expect them to come to you if they could not handle the cargo with the winches?

A. Yes, and they would, there is no question about that.

Q. Well now, when the mates are on the deck wouldn't he go to the mates before he would come to you?

A. Oh, he might do that too.

Q. As a matter of fact when the ship is in port the captain has so much business ashore that he really isn't around to see what is going on on the ship?

A. Oh no, I don't have such an awful lot of business ashore, I attend to entering the ship, it don't take an awful lot of time, when I am in open ports like this I am on the ship practically all the time.

Q. Well you go to the agent's office and get money to pay your crew?

A. Yes, it don't take much time though.

Q. If you have to pay a man off, you go to
289 the commissioner and pay him off?

A. Yes, but I don't have to pay anybody off as a rule.

Q. Well, what I want to show is that the stevedore would not come to the master of the ship unless he couldn't get any action through the mate or the second

mate. If he couldn't get action through the mates, then he would come to the master but not until that took place?

A. Well as a rule he would not, but it is my experience that they come to me if I am on the ship very quickly.

Q. If you are on the ship?

A. Yes, if I am on the ship. They seem to get action quicker that way. I presume they think it, that is their idea.

Q. Well when you are discharging cargo, you have a mate hanging around the hatch watching things all the time don't you?

A. Yes, sure, and if anything goes wrong or anything he thinks is wrong—

Q. (Interrupting.) He would come and tell you?

A. He would try and rectify it.

Q. That is, if he could not straighten the matter out, then he would come and notify you about it?

A. If there was any trouble with the winch, he would tell the chief first more than likely he would let the chief know or ask the chief what was wrong.

Q. In other words little difficulties in getting along, they don't bother the master of a ship with those things do they?

A. No, not as a rule, not with minor things of no importance.

Mr. Price:

That's all.

290 Depositions of M. Strosk, et al., for Respondents. Received this package from C. R. Triay, Notary Public, Harris County, Texas, in person, and filed same this 12th day of January, 1926.

291 DEPOSITION DE BENE ESSE OF EDMOND O. SMITH, WITNESS FOR RESPONDENTS.

Filed Dec. 18, 1925.

In the United States District Court for the Southern District of Texas, at Galveston.

(Title Omitted.)

Deposition de bene esse of Edmond O. Smith, Witness for Respondents.

W. E. Price and D. B. MacInerny, for libelant.

Lockhart, Hughes, Lockhart & Rayzor, (J. Newton Rayzor), for respondents.

It is stipulated and agreed that the deposition of the witness Edmond O. Smith may be taken in shorthand by Ethel F. Hilton, stenographer and notary public, and afterwards transcribed by her on the typewriter; signing by the witness, sealing, filing and formal certification being waived; copy of deposition to be furnished opposing counsel; stenographer and notary fees to be taxable disbursement.

Galvestion, Texas, December 4, 1925.

292 EDMOND O. SMITH being first duly sworn to tell the whole truth, testified as follows:

On Direct Examination.

By Mr. Rayzor:

Q. What is your name?

A. Edmond O. Smith.

Q. By whom are you now employed?

A. Luckenbach Steamship Co.

Q. By whom were you employed in October, 1924?

A. Luckenbach Steamship Company.

Q. In what position are you now serving?

A. As chief officer of the Jacob Luckenbach.

Q. What ship were you on before you were on the Jacob Luckenbach?

A. The Edgar F. Luckenbach.

Q. Were you on the Edgar F. Luckenbach October, 1924?

A. Yes, sir.

Q. In what capacity were you serving on the Edgar F. Luckenbach in October, 1924?

A. Chief officer.

Q. Do you hold any license—What papers do you hold or what license?

A. Master's license, unlimited, tonnage, both sail and steam.

Q. How long have you been going to sea?

A. About twenty-seven years.

Q. Do you recall a man having been injured on the Edgar F. Luckenbach October 25, 1924?

293 A. I don't recall the exact date, but I know there was a man hurt at that time the ship was here.

Q. Was he a longshoreman, do you remember?

A. Yes, sir, longshoreman.

Q. You don't remember his name—or did you ever know it?

A. Don't know his name—don't remember his name.

Q. Do you remember how the man was injured?

A. Well, he was injured by something falling from aloft.

Q. What was it?

A. Chain fell on him.

Q. Were you on the ship the morning he was injured?

A. Yes, sir, I was there.

Q. Did you see the chain fall on the man?

A. No, sir.

Q. Were you on the ship the night before the injury?

A. I was.

Q. You were serving then as chief officer of that ship?

A. I was.

Q. Had the stevedore and the longshoremen been working the ship the day and night before the chain fell on him the next mornnig?

A. They had.

Q. Was this man you are speaking about injured at hatch No. 3 on that ship?

A. Yes, sir.

Q. Do you remember the particular winch on which he was injured?

A. I do not.

Q. You don't remember whether the port or starboard winch?

294 A. I don't remember what winch it was.

Q. Did you see any chain suspended at Hatch No. 3?

A. Did I see what?

Q. Did you see the chain that fell suspended at hatch No. 3 on the night the stevedores quit working—

A. I did.

Q. That is the night before the accident?

A. Yes.

Q. Did you see the chain the next morning?

A. I saw it next morning.

Q. Was that before the accident or after the accident?

A. Before the stevedore started to work.

Q. Where was the chain hanging the night before the accident?

A. The chain was hooked up by the stevedore so as to be clear of the hatch arm when putting on the hatches.

Q. Was or not the chain in the same position the next morning when you saw it?

A. I don't know—within a few feet, in the same position or not I don't know, but it was hanging there just the same.

Q. Did it look like it had been moved?

A. Not to me.

Q. Did it look like it was hanging in the same position as it was the night before?

A. As far as I knew it did.

Q. As a deck officer, you are familiar with the way the winches at hatch No. 3 work on the Edgar F. Luckenbach with reference to this: You knew and it
295 was part of your duty to know, how the fall would work with reference to the way the lever worked up and down? that is, if you worked the lever down do you know how the fall would work on those winches, whether it would go down or up?

A. Working the lever up, the load would go up; working the lever down the load would go down.

Q. Were all of your winches on that ship wound so that if you lifted the lever up the load would go up?

A. Yes, sir, that is the way the winches are adjusted.

Q. Was any complaint made to you on the day before the accident of any defects in any winch at hatch No. 3?

A. No, sir.

Q. Had the winches at hatch No. 3 been working satisfactorily the day before the accident?

A. I heard no reports and saw no bad actions myself.

Q. Had they been working to your satisfaction?

A. They had.

Q. Did anybody complain to you on the day of the accident, after the accident, that the winches were in a defective condition?

A. No, sir.

Q. Did they continue using the winches at hatch No. 3 after the accident?

A. Yes, sir.

Q. Did they work all right?

A. Yes, sir.

Q. It is a part of your duty as chief officer, is it not, to look after the cable and see that it is wound
296 on, etc.?

A. It is.

Q. After the accident did you do anything to the cable? Put on a new cable on any of the winches at hatch No. 3?

A. No, sir.

Q. When did you quit the Edgar F. Luckenbach?

A. March 10, 1925.

Q. Do you know whether or not any repairs of any defects in the winches at hatch No. 3 were made after the accident up until the time you left the ship?

A. No, not actual repairs, outside of a general overhauling which they always get.

Q. Did you make—or, were you there on the spot where the man was injured after the accident occurred?

A. After the accident occurred? I was.

Q. Did anything break about the winch or the tackle or gear that caused that chain to fall?

A. No, sir, nothing broke.

Q. Did anything break at all about that arrangement—the gear, tackle, etc.?

A. To make it fall?

Q. Yes?

A. No, sir.

Q. Is or is not there a stop valve on the feed line that carries the steam from the engine room into the winch?

A. Is—what?

Q. Is or not there a stop valve on the feed line that carries the steam into the winch?

A. Yes, sir.

Q. Can the winch be operated by the control lever if that stop valve is closed?

297 A. No, sir.

Q. If there was anything wrong with the stop valve leading into any of the winches at hatch No. 3, would or would not you in your line of duty be able to tell whether or not there was any defect in the valve?

A. Why certainly, because the winch would not work.

Q. Had you any trouble with any of the stop valves on the winches at hatch No. 3 before the accident or after the accident?

A. No, sir.

Q. Did anybody on the ship touch that winch or operate that winch after the longshoremen knocked off the night before the accident up until the morning of the accident?

A. Not to my knowledge.

Q. If they had wanted to operate the winch after the steam had been cut off in the engine room, if someone had wanted to operate it, would they have had to go to the engineroom and turn the steam on in order to operate the winch?

A. If the other winches had been working they would not—all they would have to do then was to open the stop valve and utilize that winch.

Q. You don't understand: After the longshoremen knocked off at night, the night before the accident, and the steam was closed off in the engine room, if anybody on the ship had wanted to operate one of the winches they would have had to go to the engine room, would they not, in order to have the steam turned on?

298 A. Yes, sir.

Q. On that particular kind of winch, when a winchman goes off and leaves his winch, would it be safer to close the stop valve—

A. Always he closes the stop valve.

Q. While you were on the Edgar F. Luckenbach did you ever see the chief engineer or any of the other engineers overhauling the winches when you were at sea?

A. Yes, sir.

Mr. Price:

We object to the question and the answer, no time being mentioned.

Q. Is there any particular time at which the engineers overhaul the winches on that ship?

Mr. Price:

Objected to because the chief engineer is best qualified to testify as to when he made repairs or when it is customary for him to make repairs, and not this witness.

A. No.

Q. How long were you on the Edgar F. Luckenbach?

A. From July 17, 1922 to March 10, 1925.

Q. During that time did you ever see the engineer overhauling the winches on the Edgar F. Luckenbach?

A. Yes, sir.

Q. On one occasion or more than one occasion?

A. Many.

Q. Can you estimate the number of occasions on which they were overhauled?

299 A. No, sir, I can't estimate the number.

Q. State whether or not the chief engineer on the Edgar F. Luckenbach overhauled the winches on every voyage?

A. On every voyage, sir.

Q. As chief officer, is it or not your duty to see that the winches are in proper working order for the stevedores?

A. It is my duty to report them if they are not working properly and have them taken care of by the engineer's department.

Q. How or to whom does the stevedore complain if the winches are not in proper condition?

A. Any officer of the deck, or may be look me up in particular.

Q. If complaint was made to an officer of the deck that the winches were not in proper condition, would you know it or not?

A. Well, I might not know it at the time but it would be reported to me later.

Q. Were or were not any complaints made to you before the accident at the time of the accident or after the accident that the winches were in bad condition at hatch No. 3?

A. No complaints whatsoever.

Q. Did you see any longshoremen on deck?

Mr. Price:

We object to the question—

Q. State whether or not you saw any longshoremen, any employes of the stevedoring company, on deck of the Edgar F. Luckenbach around hatch No. 3 on the morning this man was injured before he was injured?

A. I did see men standing around—the stevedore were there at the hatches starting to take off the

300 hatches.

Q. State whether or not you know how long these men had been around hatch No. 3 before the accident occurred?

A. I could not state exactly how long—couldn't have been there very long, they don't usually show up to start to work until eight o'clock, and may be show up a few moments before eight to start to work.

Q. Do you know when the steam was turned on from the engine room on the morning of the accident?

A. I don't know that, sir, not the exact time.

Q. Did you examine the blocks suspended from the boom over hatch No. 3 after the accident happened?

A. Why, yes, I did.

Q. What did you find with relation to their condition?

A. I didn't find anything wrong with the condition of the blocks—they were all right.

Q. Did anything break about any of the blocks?

A. Nothing broke, no—the same blocks were used afterwards.

Q. Did you or not pay any attention to the hook on one of the blocks—

A. Nothing wrong with the hook on the block.

Q. Did you find any structural defects to the hook?

A. I found the hook was not moused as I had placed it.

Q. Did you originally mouse the hook?

A. Yes, sir, I originally moused the hook.

Q. Do you remember when you moused it with reference to the accident?

A. I moused it when the gear was first rigged.

301 Q. You say you noticed a difference in the way the hook was moused? How did you originally mouse the hook?

A. There was no mouse on it at all.

Q. Did you originally mouse the hook?

A. I moused it with wire mousing.

Q. At that time there was no mousing on it at all?

A. When I saw them lower the boom down to examine the gear, I found the block was not moused as I had moused it when I rigged it.

Q. What kind of mousing did you first put on the hook?

A. Wire.

Q. Did I understand you a while ago to say or not—Did you say when you looked at the hook the same mousing was not on there?

A. Oh, no, the same mousing was not on there.

Mr. Price:

He stated there was no mousing there.

Q. No mousing on the hook at all?

A. No, sir.

Q. Did you know who took the wire mousing off?

A. No, sir, I did not.

On Cross Examination.

By Mr. Price:

Q. Now Mr. Smith, that mousing you put on there, was that capable of holding that chain if the block tipped up?

A. Yes, sir, it would be, yes, sir.

Q. That is the mousing you put on, even if the block did tip up it was capable of holding that chain in place so it would not drop on deck?

302 A. That is why I put on the mousing.

Q. Now, you had been on this ship some time before it arrived in Galveston on that trip?

A. Yes, sir.

Q. I believe this was the second day you were in Galveston that this accident occurred?

A. Yes, sir.

Q. Now when you came in, who rigged the booms to handle the cargo?

A. The stevedore rigs the boom.

Q. Who did in this case rig the boom?

A. What's that?

Q. Who did at this time and on this ship, this time we are speaking about when this accident occurred, who did rig the boom?

A. The hatch tender rigged the gear; I used my best judgment to see it was in good condition for all concerned.

Q. You were there at the time, weren't you?

A. Yes.

Q. When the rigging was going on?

A. Yes, sir.

Q. Now, did you make suggestions as to how the gear was to be rigged?

A. No.

Q. Did you assist in rigging any of them at all with the stevedore foreman?

A. Well, used our best ideas; stevedore foreman likes to rig one way, and if I can help him do it I do it. That is my duty I consider.

303 Q. Now, the day before the accident, what time did they start to discharge cargo?

A. I don't remember that time, sir.

Q. Was it eight o'clock in the morning?

A. I don't remember; I have forgot now.

Q. Did you have the steam turned on that day, the day before the accident?

A. I don't remember if I ordered the steam that day—I don't think so, because the engineer usually puts the steam on himself a period of time before working.

Q. Without saying anything to the mate about it? Does he tell the mate anything about it?

A. Oh, no, it is not customary, no, sir.

Q. It is customary for him to do it?

A. Oh, no.

Q. Suppose the winch had been handled during the night, suppose some men in the crew in going on board had pushed up against the lever and the valves were not closed, wouldn't it be a dangerous thing to turn the steam on the winches without ascertaining whether all the valves were closed and the throttle reversed in proper position before turning it on?

A. Under those conditions there is always somebody around to observe—

Q. I just want to have an answer to that question: Would it not be a dangerous thing to do that?

A. Why, certainly.

Q. You say there is usually somebody to observe those things?

304 A. Yes, sir.

Q. Who is that somebody that observes those things?

A. The deck engineer.

Q. Well, if the steam is turned on before the deck engineer comes on duty, then there is no one to observe them, is there?

A. The deck engineer usually is on duty, sir.

Q. At what time of the day?

A. That is his duty.

Q. What time does he come on duty?

A. Usually comes down early in the morning.

Q. At what hour?

A. When we start to turn to; we turn to different hours in different ports.

Q. In the port of Galveston, what time do you turn to?

A. Turn to probably eight o'clock that morning.

Q. Now the deck engineer, he turns to at eight o'clock too?

A. He turns to previous, when he turn the steam on.

Q. You say he does?

A. Yes.

Q. Why do you say he does, turn to, when the steam is turned on?

A. To see that everything is all right.

Q. Is it customary for him to turn to—

A. Yes, sir.

Q. —when the steam is turned on?

A. Yes, sir.

Q. Would it be safe practice to turn the
305 steam on without having a deck engineer on duty?

A. Practically, yes, sir.

Q. Well, I understood you to say a while ago that it would not be?

A. No, I did not say that. I mean to say that it is customary for men always to be around, because we don't turn steam on without nobody knowing the steam is turned on; always somebody watching it, sir.

Q. I asked you, who is that somebody? Who is the man that is watching it? I wish you would state the position of the man—I will give you all the time you

want—state the rating of the man or whatever man it would be?

A. That is the question? Who is that somebody?

Q. Yes?

A. That is usually an officer around the deck, one of our officers around the deck.

Q. Well, you say there is one of the officers usually around the deck? That is your answer to that question?

A. Or the deck engineer.

Q. Well, if the deck engineer was not around then there wouldn't be anyone around to know anything about conditions, would there?

A. If the deck engineer wasn't around?

Q. Yes, if the deck engineer wasn't there, then nobody would have been there, would there?

A. I haven't said somebody was there when the steam was turned on; there is always somebody there to see that everything is all right.

306 Q. Can you answer that, Mr. Smith?

A. Sir?

Q. If the deck enginer was not on deck—

A. Yes.

Q. —At the time the steam was turned on—

A. Yes.

Q. —to observe whether it was safe to turn it on, who else would be there to do it?

A. He is usually there himself, I say; it is his duty.

Q. If he wasn't there?

A. If he wasn't there? He is usually almost always there; he is supposed to be there; that is his duty to be there.

Q. It is his duty to be on deck when the steam is turn on the winches?

A. Yes, sir.

Q. That is what I want to find out. In other words, Mr. Smith, it is dangerous practice to turn steam on the

deck winches with nobody around the deck to observe, previous to turning on of the steam, whether it is safe to turn the steam on or not, isn't it?

A. As a matter of all caution we would always see the valves were closed and know they were all closed; in working with these men we don't know whether they leave them open or not, so we cautiously see that they are closed.

Q. Whose duty is it to see that they are closed?

A. The deck engineer's duty, sir. I mean that is in his line; the winches are attended by someone all the time to see that they are properly lubricated.

307 Q. When the stevedores quit work at night is it the duty of anybody to go around and see that the valves are shut off?

A. When the stevedore quits the work at night he usually turns off those valves, those valves are turned off, because those men don't take any chances themselves monkeying with those levers, reach down and close the valves just the same as they close the lever, that is the very last lever.

Q. Then is it the duty of anyone of the officers of the ship to go around and see that they have—see that the stevedores have done that?

A. Yes, it is one of our duties to know that is done, any officer that has charge of the deck.

Q. Now before the steam is turned on the winches in the morning did you make any inspection of the valves to see they were closed and everything was in proper order?

A. Naturally if the winch does not move the valves are closed.

Q. If the winch does not move the valves are closed?

A. Yes, sir.

Q. Well that is not answering my question.

(Question read.)

A. No, sir, on this particular day I did not.

Q. That is what I want to know, whether you did or not? So that when the ship first started to discharge cargo, or rather to rig up the booms, you was present and assisted the stevedore's foreman to do that—was you or was you not?

Mr. Rayzor:

To do what?

308 Mr. MacInerny.

To rig the booms.

A. I was present.

Q. And you had knowledge of the way the mousing was put on the hook?

A. Yes, sir.

Q. I believe you stated that you yourself put a wire mousing on that hook?

A. I did.

Q. Mr. Smith, I just want you to make a little sketch showing the details of the runner with the location of the eye and the hook that was moused and the manner of connecting the hook into the eye of the runner?

(Witness draws sketch.)

Q. I will ask you now, Mr. Smith, to mark the block with "X" in the middle of the block, and to point an arrow toward the hook.

A. Yes, sir (indicating).

Q. Now, I will ask you to indicate where the mousing on that hook was?

A. All right, sir (marks with "M" for mousing).

Mr. Price:

I now offer the sketch made by the witness in evidence, and ask that it be marked Exhibit 1.

Q. Now, did you inspect that mousing the morning of this accident to see if the same mousing was on there or not?

A. No, sir.

Q. Did you inspect it at any time after you put it on there?

A. No, sir.

Q. You knew that that chain was likely to fall out of the hook if there was no mousing or no proper
309 mousing on it, didn't you?

A. No, sir, not unless something extraordinary happened.

Q. Now how many men did you see about the deck that morning before this accident happened?

A. Well, I didn't count them, I don't know how many —the usual hatch gang.

Q. What were the men doing when you first saw them?

A. Uncovering the hatches, taking tarpaulins off first.

Q. And it was while these men was doing that, taking the tarpaulin off that that cargo runner went aloft and capsized—

A. I didn't see it.

Q. Oh, you did not see that?

A. No, sir.

Q. How soon after the chain struck the man did you see him?

A. I don't know how soon, I can't tell how many moments, but I came shortly after.

Q. Where were you at the time he was actually struck?

A. I was coming from the after end of the ship.

Q. So that you did not see what happened just immediately preceding the accident?

A. No, sir, I did not see it.

Q. Who else was about the deck at that time?

A. Third officer was right beside the hatch.

Q. He was right beside the hatch?

A. Yes.

Q. Where was the second officer?

310 A. Second officer was aft I think.

Q. It is the second officer's duty to remain in the after part of the ship when the cargo is being discharged?

A. Usually.

Q. And the third officer, his duty requires him to be up forward in the forward part of the ship?

A. Yes, sir.

Q. And the mate oversees the discharge of all cargo?

A. Yes.

Q. Now, you are positive are you, Mr. Smith, that there was no one else present on the forward part of the ship at that time except these longshoremen and the third officer?

A. What do you mean?

Q. Well, as you came up forward immediately after the accident, what officers did you see there then?

A. I saw the third officer.

Q. Did you see any other officers there?

A. Not to my knowledge, sir.

Q. Did you see the second officer on the after part of the ship as you left there and came forward?

A. That I won't say, whether he was there or not—forward? I don't know.

Q. What did you do when you first learned of the accident?

A. The man was taken ashore and I told the third officer to take his statement.

Q. Take whose statement?

A. Statement of the accident.

Q. Whose statement did he take?

311 A. We have a regular report to make out for all accidents; he made out a regular accident report.

Q. Who makes that, you or the third officer?

A. The third officer at that time, being the witness of it, he did that and turned it into the master of the ship.

Q. Did he take the statement of any of the other men?

A. Yes.

Q. What other statements were taken?

A. I don't remember.

Q. How many were there?

A. I don't remember.

Q. You saw the statements afterwards?

A. Yes, but I can't recall it to mind now, sir.

Q. I don't ask you to recall the statement, I just wanted to ask you to recall—

A. No, sir, I can't.

Q. —the names of the men?

A. No, I can't do that.

Q. Was your statement taken at the time?

A. Yes, sir.

Q. Who took your statement?

A. That was—at that time? No, I made no statement, no, sir.

Q. How soon after the accident did you make a statement about it?

A. When I was called upon I had nothing to say.

Q. When was you called upon?

A. Some time after, I forget now what time

312 it was.

Q. What port was it in? Galveston, San Francisco, Seattle?

A. I think we came back to Galveston and I was asked for a statement, and all I could say was what our

statements called for and that was taken up, I don't remember what it was, and I haven't seen it since.

Q. Did you sign the statement?

A. No, sir, I did not sign that statement.

Q. Did Parsons sign the statement he made the third officer?

A. I think he did.

Q. Did the second officer make a statement?

A. I don't remember whether he did or not at that time.

Q. Did he make a statement afterwards?

A. A statement afterwards? Yes, sir.

Q. Where did he make that statement?

A. I don't know whether he made statement here or where, I have forgot where they were.

Q. Were they made on board the ship or where?

A. They were made aboard the ship.

Q. Who was the statement given to?

A. To the master of the ship.

Q. To the master of the ship?

A. Yes.

Q. That was after you had returned, on the next voyage perhaps?

A. Yes, sir.

A. Yes, sir.

313 Q. But you know that Parsons and the second officer—what was his name?

A. Zickel.

Q. You know both of them made a statement?

A. Whi?

Q. You know both the third and second officer made a statement?

A. I know the third officer made a statement; about the second officer's statement I don't know.

Q. I don't mean what the contents were, but the fact he made one—

A. Yes, I suppose he made a statement, because we are always asked to.

Q. Did the chief engineer make a statement at that time also?

A. Yes, sir.

Q. And did the deck engineer make a statement at that time?

A. I don't know.

Q. But you do know the chief engineer made one?

A. Yes.

Q. Do you recall any of the stevedores that worked on the ship the day of the accident or the day before the accident?

A. By name?

Q. Yes.

A. No, sir.

Q. Could you describe any of them?

A. I might if I saw them.

314 Q. The day before the accident, do you recall a little short fellow, about the size and height of Mr. Rayzor?

A. No, nothing like him.

Q. What I am trying to find out is if you recall one of the stevedores that worked on the ship the day before the accident, a man about five feet two or three or four in height?

A. If I saw them I might know them, I couldn't call them by name—I don't know them—if I saw them I might know them, otherwise I would not, and I doubt whether I would now even, it is so long ago.

Q. Do you remember after this accident anyone calling attention to the winch running when there was no one—

A. Do I remember—what?

Q. The winch turning over while there was no one at the throttle, no one standing near the winch?

A. No, sir.

Q. Do you recall these winches turning over at any time during your experience on that ship?

A. Do I—what?

Q. Do you recall these winches turning over at any time during your experience on the ship when the throttle was shut off, the throttle lever was in neutral?

A. No, sir, I do not.

Q. Now with reference to this stop valve, that valve that is shut off you say, when that valve is shut off, if the winch actually did run, what would you say was the cause of it?

315 A. I don't understand.

Q. If when the stop valve you mention in your previous testimony was shut off, if the winch actually did run while the valve was shut off, what would you say was wrong with the valve?

Mr. Rayzor:

Respondent objects to the question because there is nothing in this record showing that the winch started while the valve was closed, and the question is purely conjectural, hypothetical, and has absolutely nothing to do with any of the issues in this case. If counsel want to allege there is a defect in the winch or in the valve let them amend their libel to allege it and we will be prepared to meet it. We object to this line of questioning.

(Question read.)

A. I would say the valve was not proper, that is all I can say.

Q. In other words, you would say there was a defect in the valve if it did not shut the steam off?

A. Yes, sir.

Q. Now when did you see the chief engineer—I believe you stated that you saw the chief engineer or that the chief engineer did overhaul some of the winches. Did he actually do that himself, and did you actually see him doing that himself?

A. Yes, sir; he does considerable work to the winches.

Q. Do you know whether or not he put these lead weights on the throttle lever?

A. Yes, sir.

316 Q. He put them on himself?

A. Yes, sir, made them himself and put them on himself.

Q. The chief enginer did that?

A. Yes.

Q. Where did he make them? Did you see him make them?

A. Yes.

Q. Where did he make them?

A. At sea.

Q. And where did he put them on?

A. Before the ship arrived.

Q. Before the ship arrived—where?

A. In port; I have forgotten which port, I can't tell you that.

Q. But you know the chief engineer made them and put them on himself?

A. Yes.

Q. How did they drill a hole to put that bolt through there?

A. Drill the hole?

Q. Yes?

Mr. Rayzor:

We object to that line of questioning; it has nothing to do with the issues in this case, and is simply encumbering the record.

Q. Answer the question: How did they drill a hole to put that bolt through?

A. I did not see him drill the holes.

Q. What were they put on there for, Mr. Smith, those lead weights?

317 A. To assist the levers in operating.

Q. Made them easier to operate, is that what you mean?

A. Yes.

Q. Now, Mr. Smith, when there is anything wrong on board a ship who would complaint usually be made to?

A. The officer on watch.

Q. By that you mean the officer on the forward part of the ship? The officer whose duty requires him to be right there on one end of the ship or the other—is that the officer you mean?

A. Yes, sir.

Q. And if there happened to be any complaints about the working gear on the forward part of the ship that would be the third mate they would make the complaint to?

A. Yes.

Q. And if it happened to be on the after end of the ship it would be the second mate?

A. Yes, sir.

Q. Then either one of those two men would make a complaint to the chief mate?

A. If they could not adjust the complaint themselves they would come to me.

Q. So that unless complaints were carried by one of these officers to you then you would not know of any complaints by the stevedore, would you?

A. Oh, yes, I know many of them because I am usually around myself.

318 Q. Now, one more question: If the throttle lever on that winch had been opened so as to

get the full force of the steam into the winch as that cargo runner went aloft, what would have happened in that case?

Mr. Rayzor:

We object to the question because it calls for a conclusion of the witness and has no bearing on the case, and is a hypothetical question and a conclusion that is not the subject of expert examination.

A. That throttle could not have been open unless somebody opened it, and if the full force of the steam was on, and opened that winch, it would run very fast, very rapidly, and they would all run—it must not have done that—I don't know, I didn't see it.

Q. Go on then, what else would have happened?

A. The block would have capsized.

Q. Would it have torn down any of the gear or not?

A. Yes.

Q. It is a fact, is it not Mr. Smith, that if the full force of the steam had been on that winch and caused that winch to revolve, that it would have torn down some of the rigging up there when the gear got two blocks—

A. I don't think so—no.

Q. In other words, then, Mr. Smith, you mean to say that with the full force of the steam on the winch that the blocks would just come together and jam and would not break any of the gear at all? Is that what you mean to say?

A. Well I don't know what to say to that.

Q. You don't know what to say to that?

A. No, sir.

318½ Q. What is the lifting capacity of the winches at No. 3 hatch on the Edgar F. Luckenbach?

A. It would depend on the purchase which I used.

Q. What was the lifting capacity with the purchase in use at the time the accident happened?

A. I should say five tons, sir.

Q. What is the lifting capacity of the winches at No. 3 hatch on a single lead, a straight lead?

A. I should say three tons safely.

Q. Three tons?

A. Yes, sir.

Q. I will ask you, Mr. Smith, if it is not a fact that the winches on the Edgar F. Luckenbach on a straight lead have a lifting capacity of at least five tons?

A. No, sir.

Q. Are you positive of that? Do you know the capacity of them, Mr. Smith, are you positive?

A. No, sir.

Q. Well, now, if there had been a proper mousing on that hook as the runner went aloft, then that chain could not have fallen down, could it?

Mr. Rayzor:

I object to the question because it is assuming something not in evidence; it is assuming an improper mousing on there at the time it went aloft, and there is no evidence in the record to that effect, and I object to the question.

A. If the block hadn't tripped the chain could not have fallen down.

319 Q. Well, if the block had tripped and there was a proper mousing on, could the chain have fallen then?

A. It all depends on how the block tripped; it is a very deep hook, sir.

Q. Well, the mousing was put on there for that very purpose, wasn't it Mr. Smith?

A. As an extra security only.

Q. Then if it was a good mousing, properly put on, if you tripped the block up then that chain could not have fallen out of it, could it?

A. Customarily used without a mousing.

Q. You are not answering my question though.

A. Yes, sir.

Q. I will repeat the question: If it was a good mousing, if the block tripped then that chain could not have fallen out of it, could it?

A. I have answered no to that, sir.

Q. Certainly. Now if you want to say anything more about it you are at liberty to go ahead and explain.

A. I could say that I put the mousing on as an extra precaution.

On Re-Direct Examination.

By Mr. Rayzor:

Q. Mr. Smith, you were asked about the officers having made statements; were or were not you referring to statements made to attorneys for the Luckenbach Steamship Company or to statements to the captain of the ship?

A. To statements made to the attorneys for the Luckenbach lines.

320 Q. While you were on board the Edgar F. Luckenbach as chief officer, did you have any trouble with any of the stop valves leaking or the control of steam going into the winches?

A. No, sir.

Q. Did any of those winches on the Edgar F. Luckenbach ever start when that valve was closed while you were on the ship?

A. I can't say that they have.

Q. Did any of them ever start to your knowledge?

A. If the valve is properly closed they will not.

Q. Did you make a thorough examination of the rigging on the port winch at hatch No. 3 after the accident?

A. I made an examination as far as that I had to take the gear down, and I didn't see anything wrong with the gear.

Q. Were you around on deck on the morning of the accident between seven and eight o'clock?

A. Yes, sir.

Q. Were you around hatch No. 3 some time during that hour—between seven and eight?

A. Yes, sir.

Q. Did you see any of the winches at hatch No. 3 turning over during that time?

A. No, sir.

Q. Did you hear any of them running during that time?

A. No.

On Re-Cross Examination.

By Mr. Price:

Q. What time were you called in the morning?

A. What time am I called in the morning?

321 Q. Yes, in port?

A. I usually get up myself.

Q. What time do you usually get up?

A. Around before the stevedores get there, whatever time it is; I usually know what time they are going to turn to, and I am always around by the time or before they get there rather.

Q. What time do you have breakfast?

A. Eight o'clock, or whenever I go get it, after I see someone around the deck, one of the officers around the deck.

Q. You don't know which one of the winches started that day?

Mr. Rayzor:

We object to that question unless it is more definitely stated.

Q. You don't know which one of the winches started on the day this man was injured, do you?

A. No, sir, I do not.

Q. And you made no examination of the winch after?

A. No, sir—of the winch?

Q. Yes?

A. No, sir.

Q. Now do you recall the name of these men who made statements as you testified a while ago?

A. Do I recall—what?

Q. Do you recall the names of the men that made statements as you have testified?

A. That made statements in my presence?

322 Q. Yes?

A. To our attorneys, you mean, in San Francisco?

Q. Yes; what were their names?

A. Mr. Parsons, the third officer.

Q. Who else?

A. Mr. Zickel, the second officer.

Q. Who else?

A. Mr. Strosk, the chief engineer.

Q. They were made in San Francisco?

A. Yes.

Q. Did you make any? When were they made?

A. I have forgotten the date, sir.

Q. Was it the first time you got back to San Francisco after the accident?

A. I have forgotten whether it was the first time or not, I have forgotten that.

Q. How long ago? Approximate the time?

A. I don't remember when they were made.

Q. Now, where else did you make a statement about it?

A. Nowhere else.

Q. Didn't you make one in Galveston here?

A. I don't remember that I did, sir.

Q. Do you know if the others did, any of these other men whose names you have mentioned?

A. I don't know, sir.

Q. Do you know if Jackson's, the deck engineer, statement was taken in San Francisco?

A. I don't know, sir, I don't know that.

323 Q. Was the throttle lever on the Edgar F. Luckenbach the same lever that was on the ship when you first went on it?

A. What's that?

Q. Was the throttle lever on the winches of the Edgar F. Luckenbach the same as was on the winches when you first joined the ship?

A. The throttles were the same, sir.

Q. Do you know whether or not they are the original throttles that were on the winch when it was built?

A. I don't know that.

Q. You say you don't know that?

A. No, sir.

Q. About how much did that chain bridle that was being used to hoist the cargo out of the ship weigh?

A. I don't know, I should say seventy-five or a hundred pounds—I don't know.

Q. Seventy-five or a hundred?

A. That is just rough; I don't know.

Q. It was a pretty heavy chain to be hit on the back with, wasn't it Mr. Smith?

A. Yes, sir—fifty or seventy-five pounds—I really don't know.

On Re-Direct Examination.

By Mr. Rayzor:

Q. Mr. Smith, I understood you to say a while ago in answer to counsel's question wherein he asked you if you knew which one of the winches started that morning and you said No. Do you or not know that
324 either one of the winches started that morning at the time of the accident?

A. I didn't see any of them started that I know of—I did not see it, no.

Q. Do you know if any of them started?

A. No, sir.

Q. Do you or not know what kind of a mousing it would take to hold up seventy-five or eighty pound chain like the one you testified about, when the hook is turned upside down? You can answer yes or no, if you know or do not know.

A. Do I know what heft of mousing would be required to hold a chain up like that?

Q. Yes.

A. I don't know. I didn't put on all I could; a good length anyhow, I don't know how much.

Q. Do you know whether or not the mousing you put on there was sufficient to hold that chain up in the event the hook should turn upside down?

A. I think so.

Q. You think it would?

A. Yes, sir, I do.

Q. Have you ever used gear with a hook on it, with a chain similar to this one without any mousing at all?

A. Yes, sir.

Q. Can you use a chain fastened on to the hook like this one safely as long as the stevedores operate the winch carefully?

A. Yes, sir.

325 **On Re-Cross Examination.**

By Mr. Price:

Q. After the accident, Mr. Smith, did you put another mousing on the hook?

A. Didn't use it any more, sir.

Q. Didn't use what any more?

A. Didn't use that gear any more; we changed the gear.

Q. You changed the gear?

A. Yes, sir.

Q. What change was made in the gear?

A. It was placed back to the original gear.

Q. Placed back, to the original gear?

A. Yes, sir.

Q. Well, what do you mean? Explain what was done?

A. That was a special gear rigged to take in some three ton weights.

Q. To take in some three ton weights?

A. Yes, sir.

Q. Well, what change was made in the gear after the accident?

A. That block was removed and was placed with a single purchase—that was a double purchase, and the block was taken off and used—they used it then for the ordinary cargo. We were putting in those large wheels.

Q. Didn't they have some more large wheels to put in or take out?

A. I think the wheels were all finished—may be a few more. I have forgotten what that was; but of course we had to lower the booms to get that block down.

Q. You had to lower the boom to get the

326 block down?

A. Yes, sir.

Q. Why didn't the block come down when you slacked off the runner?

A. It was held up there, two blocks.

Q. Was the single purchase a safer rigging than the double purchase you had there?

A. No, sir; the double purchase was safer than the single purchase.

Q. So that you did not put any mousing—there was no mousing after that then, after the accident? What do you know about that?

A. I don't remember any more about that, sir, I don't remember whether we re-rigged that gear to start other cargo with or not; I have forgotten without tracing it to the ship's logbook to find out.

Q. Did you make a report in the ship's logbook about the accident?

A. No; there is a regular statement made out for that, you know.

Q. But you did not enter it in the logbook?

A. No, sir.

Q. Now, Mr. Rayzor asked you a while ago how much mousing or what kind of mousing would be required to hold a seventy-five or hundred pound chain up. When a block is tipped up that way, isn't it a fact that anything that would hold the strain of the weight to come upon it would have prevented the chain from
327 falling out?

A. I don't know; it would not take much of a mousing to hold it, sir.

Q. It would not take much of a mousing to hold it?

A. No, sir; I did not measure it.

Exhibit I

329 EXHIBIT I.

330 Deposition de bene esse of Edmond O. Smith, witness for Respondents. Received this package from the hands of Ethel F. Hilton, Officer before whom taken this 18th day of December, 1925, and filed same this 18th day of December, 1925.

331 RESPDTS. EX.—AGREEMENT CONCERNING TESTIMONY OF FRED ZICKL.

Filed Jany. 12, 1926.

In the United States District Court for the Southern District of Texas, Galveston Division.

(Title Omitted.)

Now come the parties in the above entitled and numbered cause, acting through their proctors, and agree that the statement of Fred Zickl, second officer of the "Edgar F. Luckenbach" at the time the injuries complained of in the above entitled cause arose, may be introduced in evidence on the trial of this cause by the respondents, or any one of them without objection from the libelant, and the matter contained in the statement shall be considered as if stated by the witness in open Court, testifying under oath, subject to cross examination.

Statement of FRED ZICKL, second mate:

"I remember the rig. The block was the ship's block double shieve. I do not remember whether the hook was moused. The chain was the stevedores chain, used to

pick up five ton trucks and perhaps weighed one hundred pounds. I made no inspection before or after, but I saw the chain hoisted up when the stevedores left on the night of the 24th, and it was in the same position in the morning and up to the time of the accident. I did not hear the winch."

It is agreed that this statement relates to the port winch and rigging block, etc., connected with said winch at hatch where Buzynski was injured.

W. E. PRICE & D. B.
MacINERNEY,
Proctors for Libelant,
By W. E. PRICE.

332 LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for Respondents.

---

333 MEMORANDUM OPINION.

Filed Feby. 9, 1926.

(Title Omitted.)

In this case the following facts appear without dispute: That libelant was at a place and engaged in a work to which he had been assigned and was wholly without fault. That while so placed and so engaged the chain block was caused to ascend in such manner as, though there was apparently small noise or excitement about its ascent, the chain came out of the hook and fell upon Buzynski, injuring him apparently quite seriously. The contention of the libelant is that this occurred not only

without fault on the part of Buzynski but because of the causative negligence and fault of both defendants.

While there is no direct evidence that the chain block traveled upward because of the winch having been set in motion, the evidence admits of no other conclusion, and it must be affirmatively found that the winch got into motion and as a result of that motion the accident occurred.

Libelant lays much stress on the defective equipment of the hook in regard to the character of mousing used. While not making a definite finding on that point I am inclined to think that the mousing was not the proximate cause of the injury but that that cause lies further back. I think however that the mousing was insufficient and there should have been a different character of mousing used. To separate causation into proximate and remote cause is a task for the logician and the scientist,
334 but the common lawyer has gone a long way in trying to outdo both in some cases. I think it sufficient for me to say that whether this could be held to be the proximate cause of the injury if no other fault appeared, is for the purpose of this case immaterial, as the real fault and the real proximate cause of the injury is to be found in the involuntary starting of the winch under the circumstances which the evidence discloses.

At this point the respondent calls for a Scotch verdict of "not proven" and contents himself with the assertion that however lamentable the injury the fact that the evidence does not specifically and directly present the cause exonerates both defendants. I do not think the matter is thus easily disposed of. Such a cavalier disposition of the matter might be well enough if the evidence were different; but that groping and surmising for the many causes which the respondent imagines might

have occurred is not necessary in this case in view of the direct evidence from which the inference irresistably flows. That direct evidence is that the winch was not equipped with a device which would prevent its involuntary starting, and it will not do to say that either the ship or the stevedore had a right to assume that those operating the winch would use the cut-off rather than the devise [device] which should have been supplied at the starting lever. It would be just as reasonable to say that every householder should proceed to his meter box and cut the gas out of his house instead of relying on the wall plugs, and therefore charge him with the consequences of injury if some of the gas cocks in his house were defective.

The evidence I think makes it plain that the steam had been on for some time before the injury, and the character of the journey of the travelling block, that is its apparently quiet movement, is explained only on the theory that only a small part of the steam had come through the winch valves; that the matter did not occur as suggested from a sudden turning on of the steam and the opening of a valve, but that it occurred from a leak in the valve which released enough pressure to cause the accident but not enough to wreck the device.

335 Since the duty of the ship to furnish a safe winch is co-relative and equal with the duty on the stevedore to do the same thing, I think it clear that neither defendant may escape the consequences of the act of causative fault in this case, the defective lever. I therefore find for libelant against both defendants.

The evidence makes it plain that William Parr & Company had no relation to the matter except that of an agency for the ship whose duties were not remotely connected with the injury or its cause, and while the decree should be for the libelant against Luckenbach

Steamship Company and Texas Contracting Company, the libel should be dismissed as to William Parr & Company.

J. C. HUTCHESON, JR.,
Judge.

---

336 DECREE.

Filed Feby. 17, 1926.

(Title Omitted.)

Final Decree entered in the United States District Court at Galveston, Texas, on the 17th day of February, A. D. 1926.

This cause came on to be heard at the January Term A. D. 1926, of the above Court, when came all the parties to the above entitled and numbered cause and on the 12th day of January, A. D. 1926, the Court having heard the pleading and the proof as to the liability of the respondents and being fully advised as to the law did find on the 13th day of January, A. D. 1926 that the libel against Wm. Parr & Co. should be dismissed.

And the Court taking the cause under advisement and after due consideration of the same did by a memorandum opinion filed February 9th, 1926, did set forth that the Libelant should have his libel for damage against the Respondents the Luckenbach Steamship Company and the Respondent Texas Contracting Company and did set the cause down for hearing on February 15th, 1926, as to the amount of damages that should be decreed against the respondents the Luckenbach Steamship Company and the Texas Contracting Company.

And on the said February 15th, A. D. 1926, appeared the Libelant by his Proctors and the Respondents the Luckenbach Steamship Company and the Texas Contracting Company by their Proctors and the
337 Court having heard the evidence as to the injury to the libelant and as to the measure of damages is of the opinion that the said libelant is entitled to a judgment in the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) less a credit of Seven Hundred and Twenty Dollars ($720.00) heretofore paid to libelant by the Texas Contracting Company, and the payment of the Doctor and medicine bill of Dr. Jesse A. Flautt the sum of $700.00 100 all of which is to be paid by the respondents the Luckenbach Steamship Company and or the Texas Contracting Company, as well as six per cent interest on this judgment from the date of the injury to the libelant, to-wit, the 25th day of October, A. D. 1924.

Now, therefore, be it ordered, adjudged and decreed that the libel against William Parr & Co. be and the same is hereby dismissed.

And it is further ordered, adjudged and decreed that the libelant herein Karl Buzynski do have and recover of and from the respondents the Luckenbach Steamship Company and Texas Contracting Company in solido, jointly and severally, the full sums of money as hereinbefore set forth, to-wit, the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) less a credit of Seven Hundred and Twenty Dollars ($720.00) heretofore paid to the libelant Karl Buzynski by the Texas Contracting Company, and the payment of the Doctor and medicine bill of Dr. Jesse A. Flautt, the sum of $700 all of which is to be paid by the respondents the Luckenbach

Steamship Company and the respondent Texas Contracting Company, in solido, jointly and severally, as well as six per cent interest on this judgment from the date of the injury to the libelant Karl Buzynski, to-wit, the 25th day of October, A. D. 1924, and all costs in this behalf expended.

It is further ordered, adjudged and decreed that the libelant Karl Buzynski shall have his execution for this judgment, medical bill and doctor bill, interest and cost against the respondents the Luckenbach Steamship Company and Texas Contracting Company, in solido,
338 both or either of them, as often as necessary.

Leave granted to respondent for 60 days in which to supersede.

Judgment rendered 15th day of February, A. D. 1926.

Judgment signed 17th day of February, A. D. 1926.

J. C. HUTCHESON, JR., Judge.

Approved:

W. E. PRICE and
D. B. MacINERNEY,
Proctors for Libelant,

LOCKHART, HUGHES, L. & R.,
Proctors for Luckenbach S. S. Co. & Texas Contracting Co.

MART H. ROYSTON,
Proctor for Wm. Parr & Co.

339 PETITION FOR APPEAL, AND ORDER THEREON.

Filed March 17, 1926.

(Title Omitted.)

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

Now come Luckenbach Steamship Company, Inc., and Texas Contracting Company, respondents in the above entitled and numbered cause and feeling themselves aggrieved by the final decree entered in the said cause by this Court on the 15th day of February, A. D. 1926, hereby pray that an appeal may be allowed to them from the said decree to the Circuit Court of Appeals for the Fifth Circuit, and in connection with this petition herewith present their assignments of error.

Petitioners further pray that an order of supersedeas may be entered herein pending the final disposition of the cause and that the amount of security may be fixed by the order allowing this appeal.

LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for respondents.

The foregoing petition for an appeal together with it [its] accompanying assignments of error having been presented to and considered by me, the appeal as prayed for is allowed, the same to be returnable to the Circuit Court of Appeals for the Fifth Circuit, within thirty days from date of this order, and the bond to be furnished by respondents is hereby fixed at the sum of Twenty-

340 seven Thousand Dollars ($27,000.00) and the

respondents having presented their bond in said sum, properly conditioned with American Indemnity Company as surety thereon, such bond is hereby approved and ordered filed and supersedeas on the judgment herein rendered by this Court is ordered pending the termination of this cause on appeal.

J. C. HUTCHESON, JR.,
Judge United States District Court for the Southern District of Texas.

The undersigned as proctors of record for the libelant hereby acknowledge receipt of a true and correct copy of the foregoing petition for an appeal and order of the Court thereon, and waives service of notice or citation on the same.

W. E. PRICE,
Proctors for Libelant,
D. B. MacINERNEY,
By W. E. PRICE.

---

341 ASSIGNMENTS ERRORS.

Filed March 17, 1926.

(Title Omitted.)

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

Now come Luckenbach Steamship Company, Inc. and Texas Contracting Company, respondents in the above entitled and numbered cause, by their proctors, Lockhart,

Hughes, Lockhart & Rayzor, and in connection with their petition for appeal, assign the following errors:

First: The Court erred in allowing a recovery in favor of libelant against the respondent Luckenbach Steamship Company, Inc., for any amount.

Second. The Court erred in allowing a recovery in favor of libelant against respondent Texas Contracting Company for any amount.

Third: The Court erred in allowing a joint recovery against Luckenbach Steamship Company, Inc., and Texas Contracting Company for any amount.

Fourth: The Court erred in allowing a recovery in favor of libelants against either or both of these respondents in the sum of Twelve Thousand Four Hundred Eighty Dollars ($12,480.00) with interest and costs.

Fifth: The Court erred in holding that the winch was defective due to the absence of a safety device on the control lever.

342 Sixth: The Court erred in holding the winch defective since there is no evidence to sustain such a finding.

Seventh: The Court erred in holding that the absence of a safety device on the actuating or control lever of the winch was the proximate cause of the injury.

Eighth: The Court erred in holding that the libelant had sustained the burden of proof in showing the proximate cause of the injury.

Nineth: The Court erred in allowing interest on the damages awarded since the libelant is seeking to recover unliquidated damages.

LOCKHART, HUGHES,
LOCKHART & RAYZOR,
Proctors for Respondents, Luckenbach Steamship Company, Inc., and Texas Contracting Company.

---

343 COST AND SUPERSEDEAS BONDS.

Filed March 17, 1926.

(Title Omitted.)

To the Honorable J. C. Hutcheson, Jr., Judge of said Court:

Know all men by these presents: That we, Luckenbach Steamship Company, Inc., and Texas Contracting Company, as principals and American Indemnity Company, as surety, are held and firmly bound unto K. Buzynski, in the sum of Two Hundred Fifty Dollars ($250.00) and in the further sum of Twenty-seven Thousand Dollars ($27,000.00), for the payment of which well and truly to be made, we bind ourselves, and each of us, our heirs, administrators, successors and assigns, jointly and severally.

The condition of the foregoing obligation, is, however, such that

Whereas, the said Luckenbach Steamship Company, Inc., and Texas Contracting Company, have appealed to the Circuit Court of Appeals for the Fifth Circuit from a decree of the District Court of the United States for the Southern District of Texas entered at its Galveston Division by the said Court on the 15th day of February, A. D. 1926, in that certain cause in admiralty, numbered A. D. 1266, wherein the aforesaid K. Buzynski was libelant and the appellants Luckenbach Steamship Company, Inc. and Texas Contracting Company were respondents, which decree awarded to said libelant against the
344 said respondents, jointly and severally the total sum of Twelve Thousand Four Hundred Eighty Dollars ($12,480.00) with interest thereon and costs of suit; and,

Whereas, the said appellants Luckenbach Steamship Company, Inc., and Texas Contracting Company, desire during the process of such appeal to stay the execution of the said decree of the District Court aforesaid:

Now, therefore, if the above bounden Luckenbach Steamship Company, Inc., and Texas Contracting Company, appellants as aforesaid, shall prosecute their said appeal and shall pay all costs which may be awarded against them as such appellants if the appeal is not sustained, and shall abide decree by and perform whatever decree shall be rendered by the United States Circuit Court of Appeals, for the Fifth Circuit in this cause, or on the mandate of the said Court to the Court below,

then this obligation to be void, otherwise it is to remain in full force and effect.

LUCKENBACH STEAMSHIP
COMPANY, INC.,
By J. NEWTON RAYZOR,
Atty. in law & in fact,

TEXAS CONTRACTING
COMPANY,
By J. NEWTON RAYZOR,
Atty. in law & in fact,
Principals.

(Seal) AMERICAN INDEMNITY
COMPANY,
By A. C. WOOD,
Atty. in fact., Surety.

The undersigned hereby agree to the foregoing bond as being sufficient both as to amount and sureties.

W. E. PRICE,
D. B. MacINERNEY,
By W. E. PRICE,
Proctors for libelant.

345 ORDER DIRECTING EXHIBIT TO BE MADE PART OF RECORD.

Filed March 27, 1926.

(Title Omitted.)

On motion of Lockhart, Hughes, Lockhart & Rayzor, proctors for respondents, it is order [ordered] that all exhibits offered in evidence on the trial of the above entitled and numbered cause be made a part of the record of this case and be sent to the United States Circuit Court of Appeals at New Orleans as a part of such record in the appeal of this cause.

J. C. HUTCHESON, JR.,
U. S. District Judge,

Houston, Texas, March 26, 1926.

346 CLERK'S CERTIFICATE.

In the District Court of the United States for the Southern District of Texas, at Galveston.

I, L. C. MASTERSON, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct transcript of the record of the District Court of the United States for the Southern District of Texas, holding sessions at Galveston, made up pursuant to rule 49, Section III of Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction Promulgated by the Supreme Court of the United States December 6, 1920, to take effect March 7, 1921, in cause No. 1266 on the Admiralty Docket of said Court, entitled Karl Buzynski vs. Luckenbach Steamship Company, Texas Contracting Company, and William Parr & Company, as the same now appears on file and of record in my office.

To certify which witness my hand and seal of said Court, at Galveston, in said District, this the 3rd day of April, A. D. 1926.

L. C. MASTERSON,
(Seal) Clerk, U. S. District Court,
Southern District of Texas.

By G. PREDECKI, Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

No. 4786

LUCKENBACH STEAMSHIP COMPANY, INC., et al.

versus

KARL BUZYNSKI

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 10th, 1927

On this day this cause was called, and, after argument by J. Newton Rayzor, Esq., for appellants, and W. E. Price, Esq., for appellee, was submitted to the Court.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 4786

LUCKENBACH STEAMSHIP COMPANY, INC., et al., Appellants,

versus

KARL BUZYNSKI, Appellee

Appeal from the District Court of the United States for the Southern District of Texas

J. Newton Rayzor (Lockhart, Hughes, Lockhart & Rayzor on the brief), for Appellants.
W. E. Price (D. B. MacInerney on the brief), for Appellee.

Before Walker, Bryan, and Foster, Circuit Judges

OPINION OF THE COURT—Filed June 2nd, 1927

FOSTER, Circuit Judge:

Appellee, Karl Buzynski, filed a libel against the Luckenbach Steamship Company, hereafter called the Steamship

Company, owner of the Steamship Edgar F. Luckenbach, against William Parr & Co., agents of the Steamship Company, and against the Texas Contracting Company, contracting stevedores, hereafter called the Contracting Company, to recover damages for personal injuries suffered while working as a longshoreman on the said ship in the port of Galveston.

Buzynski was employed by the Contracting Company, an independent contractor engaged in loading the ship. The ship's winches were used, the Contracting Company supplying the winchman. On the morning of October 25, 1924, just after he had started to work, and while he was engaged with a number of other men in removing the hatch covers from number 3 hatch on the said ship, without warning a chain sling, or bridle, weighing about 40 pounds fell from aloft and struck and injured him.

The libel alleged in general terms that respondents were negligent in not providing libellant with a safe place to work and safe equipment to work with and in failing to keep the same in reasonably safe condition, without specifying wherein the premises were unsafe or the appliances defective. On the trial of the case it developed that the chain which injured libellant fell from the end of the boom of a derrick at number 3 hatch. The derrick was equipped with a fall rigged with an upper and lower block. In some way, not shown by direct evidence, the winch to which this fall was connected was put in motion, the blocks jammed at the end of the boom, the lower block upset, the chain came against the mousing of a hook from which it was suspended, the mousing gave away and the chain dropped.

Libellant contended that the winch was defective because not fitted with a pin to hold the control lever of the winch in neutral; that the mousing was insufficient and defective; and that the lower block should have been fitted with a shackle instead of a hook.

The District Court found that the mousing was insufficient but that this was not the proximate cause of the accident; found that the winch was put in motion because of steam leaking into the cylinders, causing it to start up when no one was in attendance; and held that it was defective in not being fitted with a pin to hold the lever in position. The libel was dismissed as to Wm. Parr & Co.

and judgment was entered in solido against the other two respondents in the sum of $12,500, less some $720 paid by the Construction Company to libellant under the provisions of the Texas Workmen's Compensation Law.

We agree with the District Court that the mousing was not the proximate cause of the accident. It is shown without dispute that it was the usual mousing and was put on by the foreman of the Contracting Company under the supervision of the mate of the vessel. A mousing is not intended to support any weight. Its purpose is to keep the sling from slipping out of the hook when the tackle is slacked off to release the load after it has landed, and, while it is true that if the block had been fitted with a schackle, instead of a hook, the accident would not have occurred, unless some part of the tackle gave away, for the purpose of doing the work at hand the hook was sufficiently strong and safe. The accident was not such as should have been reasonably anticipated so as to require the use of a shackle in the exercise of reasonable case.

As libellant was an employee of an independent contractor the relationship of master and servant did not exist between him and the steamship company. However, it owed him the duty of using reasonable care to furnish him with reasonably safe appliances to work with, suitable to the work being done, and of inspecting these appliances before turning them over to the Contracting Company. If thereafter the appliances became defective through use while in charge of the Contracting Company it was necessary for notice of that fact to be brought home to the Steamship Company to impress it with liability. Navigazione Alta Italia vs. Vale, 221 F. 413.

On the other hand, the relationship of master and servant did exist as between libellant and the Contracting Company and they owed him the absolute and non-delegable duty of using reasonable care to provide him with a reasonably safe place to work and reasonably safe appliances to do the work with, but in the exercise of this degree of care the Contracting Company was entitled to rely to some extent upon the duty of the Steamship Company to initially furnish safe appliances. Labatt's Master & Servant, pars. 1055 to 1065.

The winch which caused the accident is described as a typical twin cylinder single drum controlled gear winch.

It is operated by a vertical throttle valve controlled by a lever about 6 feet long, hinged to a fulorum about 2 feet from the operating valve. The lever is horizontal in neutral and moves up and down between guides fitted on one inner side with cogs about 3/16 of an inch deep which engage corresponding cogs on the lever. Slight pressure from the winchman will cause these cogs to mesh so that the lever is held in position unless moved by hand or jarred in some way. The steam for operating the winch comes from a pipe line on deck leading to the boilers which is closed by a check valve so placed that the man operating the lever can conveniently and at the same time open or close the valve. When this check valve is closed no steam can be admitted to either the operating valve or the cylinders of the winch and it can not operate no matter what position the lever may be in. There is evidence tending to show that the lever may be thrown out of position by a jarring of the ship causing the drum of the winch to revolve, if steam is on. Some of the evidence tends to show that if the lever is jarred out of position it will fall; in which event the tackle would have been slacked off and the accident would not have happened, but there is also evidence that it might go either up or down. It is shown that the winch in question is of standard construction and of the kind used on many steamships but it is also shown that some winches of the same type have a pin which may be put through corresponding holes in the lever and guides to hold the lever in position.

It is elementary that an employer is not obliged to supply the newest and best appliances but is justified in using such appliances as are in common use and are reasonably safe and proper for doing the work. Measured by this standard it would appear that the winch in question was reasonably safe. It did not develop any defect when in operation and no accident occurred while it was being used for the work. It became a dangerous factor in a most extraordinary accident when left at rest and unattended. If the check valve was cut off, as it should have been when the winch was not in use, it would be just as safe as if the lever were secured by a pin, provided the winch was otherwise in good condition, and it could hardly be said that the addition of a pin would add any factor of safety, considering the ever present human equation, as the operator might

as well have forgotten to put the pin in place as to cut off the valve.

The testimony shows without contradiction that it was the custom on the ship to overhaul the winches on every trip after leaving port and, regarding this particular winch, that it had been taken apart and thoroughly inspected and the valves measured to determine the amount of wear before the ship arrived at Galveston. The winch had been in operation for at least a day and a night and no complaint had been made by anyone as to its condition. Immediately after the accident it operated without any repairs having been made.

The fact that an accident happens is not proof of negligence and it was incumbent upon libellant to show with reasonable certainty that he was injured through the negligence or breach of duty of one or both of respondents. Patton vs. Texas & Pacific Railroad, 179 U. S. 658.

In this case if the winch had failed during the work, causing the sling to fall, that would have been prima facie evidence that it was defective but not necessarily of negligence, considering the difference in the measure of responsibility of the respondents. There was no evidence to show what put the winch in motion. It was not shown that there was any jarring of the ship or that anyone touched the winch. No one noticed the winch in motion and no one was aware of any impending danger until the accident happened. It is certain that if the stop valve was closed and in good order the accident could not have occurred whether the lever was moved or not. It is also reasonably certain that if the lever was properly left in neutral and the cogs meshed it would not move unless jarred out of place or moved by hand.

Any theory as to what caused the movement of the winch is largely conjecture. The evidence in the record is hardly sufficient to show that the winch was leaking enough to make it dangerous. There is a general statement from several witnesses that it was leaking steam when in use but nothing to show that the check valve was defective or leaking or that the winch showed any evidence of leaking in between shipts of workmen when standing idle and there is direct evidence from one witness that the check valve showed no signs of leaking. Furthermore, the evi-

re showing that leaking steam could come there check valve
re that this slipping steam could cause operation of winch
And there

dence is conflicting as to whether it was possible for the winch to operate because of leaking steam, some witnesses testifying that the steam would leak equally into both cylinders without any effect upon the movement of the machine and others giving an opinion to the contrary. But even on this theory it would be necessary to show that the winch was defective when turned over to the longshoremen, or that the ship had notice that it had become defective in use, in order to hold the Steamship Company.

Berg, the winchman who operated the winch the night before the accident and who left it about 10 o'clock, testified that he put the lever in neutral and left it there. His testimony is contradictory as to whether he closed the stop valve. He made a statement shortly after the accident to a representative of an insurance company that he had closed it, but in his testimony at the trial he stated that he did not remember whether he closed it or not. He denied that he touched the winch on the morning of the accident and denied that there was any rule requiring him to close the stop valve when quitting work or that he was instructed to do so. On the other hand there is evidence from his foreman that it was the general rule that winchmen should always close off the steam from the feed pipe when quitting work and that this man had been so instructed. As this conforms to common sense and prudence it perhaps ought to prevail. It is further shown that steam is cut off at the boilers from the winches immediately after the longshoremen stop work and it is turned on again about 30 minutes before they resume; that it is customary for the winchmen on going aboard to operate the winches for awhile in order to warm them up and get ready for the day's work. When the gang quit work the night before the accident the sling was left hanging about 6 feet above the hatch. When the men resumed work in the morning it might have been considered in the way of removing the hatch covers and the winch might have been operated to raise it.

By the evidence just referred to the very reasonable hypotheses might be supported; first, that Berg forgot to close off the stop valve on quitting work and that as the steam was turned on in the morning it entered the throttle or operating valve and the lever was shifted by someone carelessly knocking against it; second, that someone, either

the winchman or another longshoreman started up the winch to raise the sling out of the way and carelessly allowed the blocks to jam; third, that the winchman started to warm up the winch and thoughtlessly turned aside for something else. On any of these theories there would be no liability of the Steamship Company, as no defect in the winch would be shown, and as between libellant and the Contracting Company the negligence would be that of a fellow servant or a third person.

On the whole case it is evident that libellant has failed to prove negligence or breach of duty by either respondent. Where there are two defendants, either or both of whom may be liable, it is necessary to show with reasonable certainty by a clear preponderance of the evidence in which the fault lies, perhaps more definitely then when there is but a single defendant.

It follows that the judgment appealed from must be reversed.

No. 4786

LUCKENBACH STEAMSHIP COMPANY, INC., et al

versus

KARL BUZYNSKI

JUDGMENT

Extract from the Minutes of June 2nd, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered, adjudged and decreed that the appellee, Karl Buzynski, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

PETITION FOR REHEARING—Filed June 18th, 1927
No. 4786

In the United States Circuit of Appeals

FIFTH CIRCUIT

LUCKENBACH STEAMSHIP CO., INC., ET AL,
APPELLANTS

vs.

KARL BUZYNSKI, APPELLEE.

APPELLEE'S MOTION FOR REHEARING.

Point One

Now comes Karl Buzynski, appellee, and prays the court to set aside the judgment of reversal rendered herein on the 2nd day of June, A. D., 1927, and to grant him a rehearing of this cause for the following reasons:

BECAUSE THIS COURT MISTOOK A PHOTOGRAPH OF A PROPER WINCH THAT HAD COGS ON THE OPERATING LEVER, AND HAD COGS ON THE OPERATING LEVER GUIDE FOR A PHOTOGRAPH OF THE WINCH THAT CAUSED APPELLEE'S INJURY, WHICH HAD NO COGS OF ANY

KIND ON THE OPERATING LEVER OR GUIDE, AND BASED ITS ENTIRE JUDGMENT ON THE WRONG WINCH.

The court on Page Four of its opinion states:

"The lever is horizontal in neutral and moves up and down between guides fitted on one inner side with cogs about 3-16 of an inch deep which engage corresponding cogs on the lever."

The Appellants on Page 3 of their brief make the following admission:

"There is no safety device on the actuating lever to hold it in neutral, and the winch was never designed or intended to have such a device."

And on Page 21, 22 of Appellants' brief it is again stated:

"In the case at bar the lower court was dealing with a winch that was neither designed for nor equipped with a safety device."

Point Two.

The court erred in its finding that the winch that caused libelant's injury was equipped with the kind of device described in its opinion, when the Appelants admitted there was no such device on the winch, and contended that no such device was necessary, and because the evidence was that the winch had no such device.

Point Three

The court erred in making the following finding of fact:

"It is also reasonably certain that if the lever was properly left in neutral and the COGS MESHED * * *

it would not move unless jarred out of place or moved by hand," because it was admitted by appellant and proven by the evidence that there was no such device on the lever whereby the lever could be PROPERLY LEFT IN NEUTRAL AND THE COGS MESHED.

Evidence Under Point One, Two and Three

Roush Gruen, one of the winchmen who run the off-shore winch, and who had run the particular winch in question, testified:

Q. Now how many days had you been operating that winch before the accident or the winches on the ship?

A. All around, winches No. 1, No. 2, No. 3?

Q. Yes.

A. Oh, about five days, I guess.

Q. What kind of a lever did they have on the winches to operate it with?

A. A lever you couldn't trust, if you didn't hold on to it, and there was steam on the winch, why she was going to fall. You either had to hold on to it or something would go wrong. Yes, that is, on that last No. 3 hatch. And No. 2 wasn't much better.

By the Court: The one where it fell off, was that No. 3?

A. Yes, Your Honor.

Q. Well, what would make it do that.

A. Well, there was no catch there to hold the lever, you see. You see, no catch there at all, nothing at all to hold it after the steam was on.

Here the witness was asked to examine a photograph of the winch on which the injury occurred. Page 38 Record.

The Photograph of the winch that caused the injury shows no COGS on the lever or on the guide, whereas, another photograph of another winch shows the COGS

on both. This Photograph was introduced in evidence to show the usual method of holding a lever in neutral. We ask the Court to examine same for the purpose of seeing the difference.

Mr. Berg Testified:

Q. State whether or not there was any provision for holding the throttle in neutral on the winch that you had been running the night before.

A. Well, you couldn't do it, Cap, you had to feel your way on it. There was no preventer or stopping of it. You had to feel your way altogether; there wasn't nothing to keep her in neutral, not at all; you had to feel your way on it all the time.

Q. Is it customary for winches to be provided with a place to hold the throttle in neutral or not/

A. Yes, sir, most of them has got that, most of them has got a little spring, etc, Page 64 Record.

Point Four

The Court erred in holding as a matter of law that the Independent Contractor had a right to rely on the ship to originally furnish safe appliances, because said holding is inconsistent with the absolute and non-delegable duty of the Independent Contractor to furnish his servant with a safe place to work, and with safe appliances to work with, and, because such doctrine would take away from the servant all the protection of the law, and, because SAID DOCTRINE, IF APPLICABLE IN ANY CASE, IS NOT APPLICABLE IN ADMIRALTY, AND IN COMMON LAW CASES ONLY WHERE THE MASTER PURCHASED A * * * NEW ARTICLE, * * * and because the winch that caused libelant's injur-

ies was an old winch, and the ORIGINAL DESIGN THEREOF HAD BEEN CHANGED BY THE ATTACHMENT THERETO OF LEAD WEIGHTS OF ABOUT 20 POUNDS THAT WERE PLAINLY VISIBLE AT A GLANCE.

Authorities.

Labatt's Master & Servant, page 2786, 2788 and 2789, being a part of Parg. 1055.

Vickers vs. Kanawha & W. R. Co. 64 W. Va. 474, 63 S. E. 367.

Cole V. D. C. & E. Min. Co. 204 S. W. 197 (Mo.)

Toledo Brewing Co. vs. Bosch 101 Fed. 530.

Gulf Colo. & S. F. Ry. 55 S. W. 538 (Tex.)

Hailey-Ola Coal Co. vs. Parker 32 Oak. 642, 122 Pac. 632.

In Labatt, supra, he says:

"There are two VERY WEIGHTY REASONS why the theory that a master is entitled, as a matter of law, to rely on the quality of appliances obtained from a reputable manufacturer, SHOULD BE REJECTED." One of these is that such theory is essentially inconsistent with the Doctrine of NON-DELEGABLE DUTIES." "As between Master and servant, this doctrine should, (Doctrine of non-delegable duties) it is submitted, always be regarded as controlling whenever it comes in conflict with that which declares that the employer of an independent contractor is not liable for his negligence, etc. And on Page 2788 (being part of parg. 1055) Labatt goes on to say: "Assuming the defect which caused the injury to have been discoverable by the exercise of proper care, SOMEONE OUGHT, in fairness, to be held res-

ponsible for its existence, and it is A MERE MOCKERY OF JUSTICE TO ABSOLVE THE MASTER SIMPLY ON THE GROUND that he was justified in trusting to the skill and diligence of a person, who if that skill and diligence were, as a matter of fact, not exercised, is not liable because there is no privity of contract between them."

This language of Labatt is copied verbatim in the following cases cited above:

Vickers vs. Kanawha & W. Ry. Co.

Cole vs. D. C. & E. Min. Co

Coal Co. vs. Parker.

A rule of law condemned as a MERE MOCKERY OF JUSTCE by the following authorities:

Labatt on Master and Servant, supra.

The Supreme Court of West Va., supra.

The Supreme Court of Oklahoma, supra.

The Supreme Court of Missouri, supra.

And the other authorities mentioned above will not be applied in Admiralty, where the injured party was wholly without fault.

Authorities.

The Max Morris. 24 Fed. 860.

The Max Morris 137 U. S. 1, 34 Law Ed. 586. affg 28 fed 881.

The Explorer 20 Fed. 135, Pardee, Judge.

The Wanderer 20 Fed. 140.

In the Wanderer 20 Fed. 140, Judge Pardee says:

"As this court has just held, in the case of the Ex-

plorer, ante, 135, 'In cases of marine tort, courts of Admiralty ARE NOT BOUND BY THE COMMON AND CIVIL LAW RULES GOVERNING CASES OF CONTRIBUTORY NEGLIGENCE, but will, in the exercise of a sound discretion, give or withhold damages according to the principles of equity and justice considering all the circumstances of the case."

In the Max Morris 24 Fed. 863, the court there approves the holding of Judge Pardee, and says: "It is clear that in admiralty causes, even in cases of personal injuries, THIS COURT IS NOT STRICTLY BOUND BY THE COMMON LAW RULES. The language of the Supreme Court in the Marianna Flora, 11 Wheat. 54 and the Palmyra, 12 Wheat. 1, cited by Judge Pardee, sufficiently shows this."

The Supreme Court in affirming the Max Morris case, says: "On the other hand Judge Pardee, in the Circuit Court for the Eastern District of Louisiana, in the Explorer, and the Wanderer, cases in admiralty where the libelant sued for personal injuries, and he and the vessel were both held in fault, laid it down as a rule, that in cases of marine torts, courts of admiralty could exercise a conscientious discretion, etc." And the same view was applied by the District court of New York, in the Truro, 31 Fed. 158, and by the District Court for the Eastern District of Virginia, in the Eddystone, 33 Fed. 925. "This principle it is contended, is sanctioned by the language used by this (Supreme Court) court in the Marianna Flora, etc. "Even in cases of Marine Torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have NOT CIRCUMSCRIBED THEMSELVES WITHIN THE POSITIVE BOUNDARIES OF MERE MUNICIPAL LAW," etc.

Point Five.

The Court erred in not affirming the case as to the Texas Contracting Company on its finding that the fellow servants of appellee were negligent, because, since the decision of the United States Supreme Court in the case of International Stevedoring Co. vs. Haverty, United States Supreme Court Advanced Opinions, decided, October 18, 1926, not yet published in bound volumes, a longshoreman or stevedore is entitled to recover for the negligence of a fellow servant.

On Page 8 of its opinion this court found that the fellow servant of appellee was negligent, and says: "And as between libellant and the Contracting Company THE NEGLIGENCE WOULD BE THAT OF A FELLOW SERVANT, or third person.

As there was, in fact no "Third Person" about the winch or even about the deck, except libellant's fellow servants, on the morning of the accident, and no evidence of any other person being around, not even the ship's crew, the phrase, "or third person," we take was surplusage, and is untenable.

Authority.

International Stevedoring Company vs. Haverty. Law Ed. Advance Opinions Nov. 1, 1926, Page 22.

In the case cited above the Supreme Court say:

"It is open to Congress, however, to change the rule, and in our opinion it has done so. By the Act of June 5, 1920, chapter 250 Sec. 20, 41 Stat. at L. 988, 1007, Compiled Stat. Anno. Sup. 1920, P227, any seaman who shall suffer personal injury in the course of his employment may at his election, maintain an action for damages at

law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply." It is not disputed that the statutes do away with the fellow servant rule in the case of personal injuries to railway employees, etc. The policy of the statue is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should in the other, etc. "We are of the opinion that a wider scope should be given to the words of the act, and that in this statute "Seamen" is to be taken to include stevedores engaged as the plaintiff was," whatever it might mean in laws of a different kind."

Point Six.

(a) The Court erred in holding that there was no evidence that the winch was defective, and (b) in holding there was no evidence to show what put the winch in motion.

Because (1) the evidence showed that on three different occasions the winch started in motion while no one was near it, and (2) that the Chief engineer had been experimenting with the winch, and had changed the original design of the operating lever by placing thereon lead weights of about 20 pounds, and (3) because the winch could not start involuntarily, except by steam escaping through the leaking valve, or by the operating lever moving in the direction necessary to make the winch carry aloft the chain that fell and struck appellee.

This court will take judicial knowledge of the fact that when a steam winch starts in motion involuntraily that steam has entered the usual parts of same, causing

it to start.

The evidence that the winch moved involuntarily on three different occasions while no one was near the winch is as follows:

C. H. Withoff, a witness for the appellant, and foreman of the contracting stevedore on his direct examination testified:

Q. Were you on the ship when Berg returned from the Hospital?
A. Yes, sir.
Q. Did he talk to you after he came back?
A. Yes, sir.
Q. Did he call your attention to the port winch of Hatch No. 3 moving ahead at the time after he came back from the hospital?
A. Yes, sir.
Q. Did you see it move ahead?
A. Yes, sir.
Q. Explain to the Court how far the winch moved.
A. Just about half a revolution, then she stopped.
Q. Did anybody stop the winch?
A. No, sir. Page 99 record.

Mr. Berg testified:

Q. You said something about the winch leaking, you mean it leaked through the valve after the valve was shut?

A. Yes, sir, it was a funny winch, you couldn't hardly turn it loose at times. That evening, that same winch escaped and left the second time, I had to call Mr. "Kelly's" attention to it, when it went up the second time that evening when I come back from the hospital. P. 80 Rec.

The Mr. Kelly mentioned above is Mr. Whitoff.

Q. State your name, please, to the stenographer.
A. C. H. Whitoff.
Q. Are you actually known as Kelly?
A. Yes, sir. P. 98 Record.

Roush Gruen, testified:

Q. Did you see this winch or any of those winches about No. 3 hatch move when there was no one at the lever
A. I did, yes, sir.
Q. When was that, Mr. Gruen?
A. I seen that the day before this accident happened, I seen the winch move without nobody there, yes, sir.

The Court:

Q. Is that the winch you are talking about now, the same winch where this chain fell off?
A. Yes, your Honor. Page 42 Record.

The following is the evidence that the Chief Engineer had been experimenting with the winch and had changed the original design of the operating lever by attaching weights to the lever:

Q. When were those lead balls put on that lever?
A. We have been experimenting with them for about a year and a half now.
Q. You have been experimenting with them for a year and a half?
A. Yes. Chief Engineer's testimony Page 247 Rec.
Q. Why were they put on there?
A. The operating valves, as a rule, the winchman would state that the operating valves were working stiff, and it was not free enough for them. For that reason they were hanging weights on it which had no consequence, which did not help them out, so they ARE

REALLY NOT NECESSARY FOR THE OPERATION OF A WINCH, but just for the PSYCHOLOGICAL EFFECT ON THE WINCH DRIVER. * * * IT WAS PUT ON, etc.

Q. They are not a part of the regular equipment of the winch are they?

A. No. Chief Engineer's testimony Page 248. Rec.

And that those lead balls or weights were put on to make them operate easier, Mr. Smith, the Chief Officer of the ship, testified:

Q. Do you know whether or not he put these lead weights on the throttle lever?

A. Yes, sir.

Q. He put them on himself?

A. Yes, sir, made them himself and put them on himself.

Q. The Chief Engineer did that?

A. Yes, sir. Page 306. Record.

Q. What were they put on for, Mr. Smith, those lead weights?

A. To assist the levers in operating.

Q. Made them easier to operate, is that what you mean?

A. Yes. Page 307.

Chief Engineer, who was a hostile witness, testified:

Q. Well, just assume for instance that the winch had been standing still all night, and we will say that the intake valve was closed and nobody moved the throttle, the actuating lever, and that the winch started to run of its own accord, how could that happen?

A. Only if the actuating valve were leaking, etc. Page 252 Record.

Point Seven.

The court erred in holding that the burden was on

the appellee to point out the particular defect of the winch that caused it to start in motion.

Authorities.

Central R. Co. vs. Peluso, 286 Fed. 665.

Globe Steamship Co. vs. Moss, 245 Fed. (CCA) 57.

Tuckett vs. American S. & H. Laundry, 84 Pac. 500.

Mangum vs. Bullion B. & C. Co. 15 Utah 534, 50 Pac. 834.

A. T. & S. F. Ry. vs Lannigan, 56 Kan. 109, 42 Pac. 343

Nelson vs. St. Paul Plow Wks. 57 Minn. 43, 58 N. W. 868.

The rule laid down by the Supreme Court in Patton vs. T. & P. Ry. Co., and cited by the court in its opinion, has been modified and explained in the decisions of that court in subsequent cases, and are fully discussed in the case of Central R. Co. vs. Peluso, 286 Fed. 661 where the court says:

"Since the Patton case, the marked trend of legislation has been to afford greater protection to the employee, and have recognized the practical difficulties which arise in a case of injury or death because of defective appliances or equipment where there is no other explanation of the occurence." "Of this practical difficulty, the case at bar is a perfect illustration. The plaintiff in such circumstances, has neither no means or no adequate means of ascertaining either what lead to the unusual defect of the appliance or equipment or as to what inspection was made or what care, if any, was used on the part of the employer."

The justice of this doctrine is at once apparent, in the case of Buzynski, because he had only been in the em-

ploy of the stevedore and the ship five or ten minutes when he received an injury that incapacitated him for life; he had never been on that ship before, and was put to sleep on his rights by the payment to him of $20.00 per week under the theory that the Workmen's Compensation law was applicable to him.

Point Eight.

The Court erred in holding as a matter of law that the duty of the ship to the libelant ended when it turned the ship's appliances over to the contracting company, because it was the duty of the ship to keep the ship's appliances in repair and to inspect such appliances at proper intervals.

Pleckaitis vs. Henrik Ostervolze Docking Co. 294 Fed. 826.
Steel vs. McNeil, 60 Fed., 107.
The "Portland" 213 Fed 699.
The Carolina 30 Fed. 199.
The Rheola, 19 Fed. 926.
The William Brandford, 48 Fed. 914.
The Protos, 48 Fed. 919.
The Serapis, 49 Fed. 393.

This court in the case of Navigazonione Atla Italia vs. Vale, 221 Fed. 413, laid down the same rule as is laid down in this case, but cited only common law cases in support of the doctrine there stated. The decision in that case is directly in conflict with a long line of Admiralty cases, and over-rules the case of Steel vs. McNeil, 60 Fed. 107, and the "Portland" 213 Fed. 669 and the other cases cited.

In the case of Steel vs. McNiel, 60 Fed. 107, (CCA. 5th Cir.) the court says:

"The law is too well established to require argument that a vessel is bound to furnish rigging and appliances reasonably safe for the use of those employed in receiving and discharging cargo, although they may be in the immediate employ and pay of the stevedore, and that an action in Rem will lie for damages arising from defects and imperfection in such appliances furnished * * * * Whenever the defect was such that * * * * a CAREFUL EXAMINATION AT THE TIME COULD HAVE DETECTED IT, citing cases.

In the case of the "Portland" 213 Fed. 699, the facts were identically the same as in the Navigazonione Atla Italia vs. Vale cited by this court but there the libelant was allowed to recover on the same state of facts as the Navigazonione case.

In the Carolina 30 Fed. 199, the facts were practically the same as the facts in the Navigazonione case, and there the ship was held liable.

In the Rheola 19, Fed. 926, a chain that was used for hoisting cargo broke, and injured a stevedore, the Court says: A stevedore employed by another, who has contracted to unload a vessel can recover for injuries sustained by defective appliances furnished him by the vessel, UPON THE SAME EVIDENCE WHICH WOULD ENABLE HIS EMPLOYERS TO RECOVER. Though there is no privity of contract between the ship's owners and him, they were under the same obligations to him as they were to his employer. What would be negligence to one would be negligence to the other.

That the ship had notice of the dangerous condition

of the winch, and that no inspection was made of the winch on the morning of the accident is shown by the testimony of the officers of the ship, and the foreman of the stevedore gang:

Q. Now there's some danger, is there not, chief, when a man goes off and leaves that lever, if there is any vibration on the ship that the lever can drop down?

A. It could happen.

Q. Have you seen it happen?

A. Yes.

Q. Have you seen it drop down?

A. Yes. Page 235 Rec.

Knowing these facts the ship should have warned the Appellee and the stevedore of the dangerous situation.

Q. Then is it the duty of any one of the officers of the ship to go around and see that the stevedores have done that (shut off the valves)?

A. Yes, it is one of our duties to KNOW that is done, any officer that has charge of the deck.

Q. Now, before the steam is turned on the winches in the morning did you make any inspection of the valves to see that the valves were closed and everything in proper shape?

A. Naturally if the winch does not move the valves are closed.

Q. Well, that is not answering my question.

A. No, sir, on this particular day I did not. Chief Officer, 298 Rec.

That it is the duty of the ship to warn the stevedores of dangerous conditions is held in the case of the West Ison 5 Fed. (2nd) 385. In that case the man hole cover had no means to hold the cover back, it fell on a stevedore as he was descending into the hold. The lower court

held the stevedore liable, but the Circuit Court held the ship and stevedore liable.

Point Nine.

The court erred in not affirming the judgment of the lower court, because it was a fact admitted by Appellant, and proven by Appellee, that the winch had no device to prevent the winch from starting involuntarily.

Authorities.

Mather vs. Rillston, 156 U. S. 391, 39 Law Ed. 464.

Smith vs. Hewitt-Lea Lumber Co. 104 Pacific 651.

Grays Harbor Stevedoring Co. vs. Fountain, et al 5 Fed. (2nd) 385.

Choctaw R. R. Co. vs. McDade 191 U. S. 64.

In the case now before the court the undisputed evidence was that the winch started in motion because it had no device to hold the lever in neutral, and thus caused the injuries complained of. This court will take judicial knowledge of the ordinary laws of mechanics, and judicially knows that machinery does not ordinarily start in motion involuntarily. And we humbly submit to this court, that if a locomotive, after standing at rest for an hour suddenly started in motion and raced down the track and, because it had no means to prevent its involuntary starting, caused injury, its owners would be held liable for the injury, and if an elevator had no means of holding the operating mechanism at rest to keep it from starting in motion, the result would be the same.

In this case the Ship's Officers knew the danger of

the winch starting in motion, the Chief Engineer testified:

Q. Now there's some danger, is there not, chief, when a man goes off and leaves that lever, if there is any vibration on the ship that the lever can drop down?

A. It could happen.

Q. Have you seen it happen?

A. Yes.

Q. You have seen it drop down? Page 235 Record.

Q. When were those lead balls put on the lever?

A. We have been experimenting with them for a year and a half.

Q. You have been experimenting with them for a year and a half?

A. Yes. Page 247 Record.

It is only reasonably to infer that the reason the lead weights were put on the opposite end of the lever was to counteract the tendency of the lever to drop down, and unbalanced the lever, and caused it to move upward.

Q. When were those lead balls put on that lever?

A. We have been experimenting * * * * with them for a year and a half now.

Q. You have have been * * * * experimenting with them for a year and a half?

A. Yes. Page 247 Record.

Q. Why were they put on there?

A. THE OPERATING VALVES——, as a rule the winchman would state that the operating valves were working too stiff and it was not free enough for them. For that reason they were hanging weights on it which had no consequence, which did not help them out so they are not necessary, these weights WHICH ARE PUT ON ARE REALLY NOT NECESSARY, for the operation of the winch, but just for the PHSYCHOLOGICAL EFFECT ON THE WINCH DRIVER IT WAS PUT ON.

Q. Then they were put on not because they served any purpose at all but just for the PHSYCHOLOGICAL EFFECT on the winch driver?

A. Yes, sir.

Q. You say yes?

A. Yes.

We respectfully submit to this court that the lead weights were put on the operating levers for some purpose that the Appellants do not want this court to know, and the testimony that they were put on for the phsychological effect on the winchmen, is not true, especially in view of the fact that the Chief Engineer also testified that the winches were as originally as turned out.

Q. So that you wouldn't know whether the valves, actuating levers, and brackets and fulcrum stands are the same on these winches as it was when originally turned out.

A. They are as originally turned out.

Q. They are as originally turned out?

A. Yes. Page 242.

The Chief Engineer also testified that there are three winches at hatches No. 2, 3, 4, 5, and 6, making 15 winches in all.

It is not reasonable to suppose that a ship owner would spend money to buy twenty pounds of lead for each of 15 winches together with the cost of bolts and the labor of drilling the holes necessary to put these lead weights on the operating levers for the PHSYCHOLOGICAL EFFECT ON THE WINCHMEN? What could that phsychological effect be? To make the winchmen believe something that was not true? If so, is it not only reasonable to believe that that statement was made to make this COURT BELIEVE SOMETHING THAT IS NOT TRUE?

Now the Chief Engineer testified that the winches were as originally as turned out, page 242 Record, as shown above.

And on page 248 he testified that the lead weights are not part of the regular equipment.

Q. They are not part of the regular equipment of the winch, are they?

A. No.

Point Ten

The Court erred in not affirming the judgment of the lower court (a) because the lower court found the mausing insufficient in that it was not put on tight enough to prevent it from slipping off, and (b) because the insufficient mausing was a concurrent, and efficient cause of appellee's injuries, and a violation of the Master's duty to furnish him with a safe place to work.

The Following are the authorities on insufficient mausings:

W. G. Morel & Co. et al vs. Lehman. 159 Fed. 124.

Gorman vs. Cunard S. S. Co. 254 Fed. 716.

Hobbs Wall & Co. vs. Patterson, 2 Fed. (2nd) 594.

The following are the authorities of concurrent and efficient cause.

Washington & G. R. Co. vs. Hickey 166 U. S. 521. 41 Law Ed. 1101.

Wilmington Star Min. Co. vs. Fulton, 205 U. S. 60. 51 Law Ed. 708.

Delaware L. & W. R. Co. vs. Petrowsky 250 Fed. 565.

Coast Steamship Co. vs. Brady 8 Fed. (2nd) 19.

Mr. Whithoff, also known as "Kelly," the Foreman of the stevedore, testified:

Q. Did or did not you direct the men as to how to rig the gear?

A. Yes, sir.

Q. Whose men rigged the gear, your men or the crew of the ship?

A. My men.

Q. Did you examine the blocks on the gear and tackle connected with the port winch after the accident occurred to Buzynski?

A. Yes, sir.

Q. Just state to the Court, please, the condition you found the blocks in at that time. Page 101 Record.

Q. What was the position of the hook, was it in its proper place or upside down?

A. The point of the hook was down?

Q. Quite the reverse of the way it ought to have been?

A. Yes, sir, the back was up and the point of the hook was down.

Q. Did you examine the hook carefully?

A. Yes, sir.

Q. WAS OR WAS NOT THERE A MOUSING ON THE HOOK?

A. THERE WAS A MOUSING ON THE HOOK.

Q. DESCRIBE TO THE COURT HOW THE MOUSING WAS ON THE HOOK AT THE TIME YOU SAW IT.

A. WHEN I LOWERED THE BOOM DOWN, I EXAMINED THE MOUSING AND IT WAS PULLED OFF THE HOOK.

Q. IT WAS NOT ACROSS THE HOOK BUT IT WAS ON THE SHOULDER OF THE HOOK?

A. IT WAS ON THE SHOULDER, THE MIDDLE OF THE SHOULDER OR THE POINT OF THE HOOK.

From this evidence the Court can readily see that the MOUSING DID NOT BREAK, BUT OWING TO THE LOOSE AND INSUFFICIENT WAY IT WAS FASTENED TO THE HOOK THE MAUSING SLIPPED OFF OF THE HOOK.

The evidence in this case was that the winch did not move violently and carry up the falls with great force, because had it done so the entire rig would have been wrecked, but that it moved so silently that no one noticed the winch carrying the falls aloft.

The principle we contend for here is shown in the cases cited. The lower court found the Mausing insufficient, but said it was not the proximate cause, but it was a concurring cause and the Stevedore was liable because the Stevedore and his men rigged the gear.

This Court in the case of Coast S. S. Co. vs. Brady, supra, says:

"It is not necessary that the party at fault should have contemplated or anticipated that his negligence would cause the particular kind of injury which resulted; but a person guilty of negligence is liable for all consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed (whether they could have been ascertained by reasonable diligence or not) would, at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind." (Citing Sherman & Redfield on negligence (6th Ed.) Sec. 29.

In Gorman vs. Cunard S. S. Co. Supra, the Court says:

"I am satisfied, too, by the evidence, that the liability to injury from the use of the rigging in question could have been discovered by the exercise of the degree of care required under all the circumstances of the case."

And as Stated by this Court in the case of Brady, supra, the injury was the natural and probable consequence of the breach of duty.

Point Eleven.

This Court erred in reversing the findings of fact of the trial court, because it is a universal rule that the Appellate Courts will not disturb the finds of fact of the trial judge in an admiralty case, unless shown to be clearly erroneous.

Authorities.

The W. H. Flannery (C. C.) 249 Fed. 349.
Globe Steamship Co. vs. Moss (C. C.) 245 Fed. 54.
G. L. Towing Co. vs. Am. Shipbuilding Co. 243 Fed. 849.
The Baron Napier 249 Fed. 126.
Sorenson vs. Alaska S. S. Co. 247 Fed. 294.

Wherefore, Appellant prays that on hearing hereof the judgment reversing this cause heretofore rendered herein be set aside, and a rehearing granted, and that the judgment of the lower court be affirmed.

I, W. E. Price, cousel for the Appellee, do hereby certify upon my professional honor that in my opinion the grounds set forth in the foregoing petition for rehearing of this cause are well founded.

W. E. Price

Counsel for Appellee.

No. 4786

LUCKENBACH STEAMSHIP CO., INC., et al.
versus
KARL BUZYNSKI

ORDER DENYING REHEARING

Extract from the Minutes of July 18th, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 333 to 366 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeal for the Fifth Circuit, in a certain cause in said Court, numbered 4786, wherein Luckenbach Steamship Company, Inc., et al. are appellants and Karl Buznyski is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 332 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 17th day of August, A. D. 1927.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit, by E. Wendling, Deputy Clerk. (Seal United States Circuit Court of Appeals, Fifth Circuit.)